APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MARCH 12, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: January 22, 2009 Decided: March 12, 2010)

Docket Nos. 07-3677-cv (L), 07-3900-cv (XAP)

JAMES L. ALEXANDER,
ALEXANDER & CATALANO LLC,
and PUBLIC CITIZEN, INC.,

Plaintiffs-Appellees-Cross-Appellants,

- v. -

THOMAS J. CAHILL, in his official capacity as Chief Counsel for the Departmental Disciplinary Committee for the Appellate Division of the New York Court of Appeals, First Department, DIANA MAXFIELD KEARSE, in her official capacity as Chief Counsel for the Grievance Committee for the Second and Eleventh Judicial Districts, GARY L. CASELLA, in his official capacity as Chief Counsel for the Grievance Committee for the Ninth Judicial District, RITA E. ADLER, in her official capacity as Chief Counsel for the Grievance Committee for the Tenth Judicial District, MARK S. OCHS, in his official capacity as Chief Attorney for the Committee on Professional Standards for the Appellate

Appendix A

Division of the New York Court of Appeals, Third Department, ANTHONY J. GIGLIOTTI, in his official capacity as acting Chief Counsel for the Grievance Committee for the Fifth Judicial District, DANIEL A. DRAKE, in his official capacity as acting Chief Counsel for the Grievance Committee for the Seventh Judicial District and VINCENT L. SCARSELLA, in his official capacity as acting Chief Counsel for the Grievance Committee for the Eight Judicial District,

Defendants-Appellants-Cross-Appellees.

Before: WALKER and CALABRESI, *Circuit Judges.*[1]

CALABRESI, *Circuit Judge*:

New York's Appellate Division adopted new rules prohibiting certain types of attorney advertising and solicitation, which were to take effect February 1, 2007. The new rules barred, *inter alia*, testimonials from clients relating to pending matters, portrayals of judges or fictitious law firms, attention-getting techniques unrelated to attorney competence, and trade names or nicknames that imply an ability to get results. The amendments also established a thirty-day moratorium for targeted solicitation following a specific incident,

1. The Honorable Sonia Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. *See* 28 U.S.C. 46(d); Local Rule 0.14(d); *United States v. Desimone*, 140 F.3d 457 (2d Cir. 1998).

including targeted ads on television or in other media. Plaintiffs, a New York attorney, along with his law firm and a not-for-profit public interest organization, challenged these provisions as violating the First Amendment. The District Court agreed in part—it declared most of the content-based rules unconstitutional, while upholding the thirty-day moratorium. Both Plaintiffs and Defendants timely appealed from portions of the District Court's decision adverse to them. For the reasons that follow, we conclude that the District Court properly granted summary judgment to Plaintiffs with respect to the content-based advertising restrictions, with the exception of the prohibition on portrayals of fictitious law firms. We likewise conclude that the District Court properly granted summary judgment to Defendants with respect to the thirty-day moratorium. Accordingly, we affirm the District Court's opinion in large part, and reverse in part.

BACKGROUND

A. The Parties

The Plaintiffs-Appellees-Cross-Appellants ("Plaintiffs") are an individual (James Alexander), a law firm (Alexander & Catalano), and a not-for-profit consumer rights organization (Public Citizen). Alexander is the managing partner of Alexander & Catalano, a personal injury law firm with offices in Syracuse and Rochester. Alexander & Catalano use various broadcast and print media to advertise. Prior to the adoption of New York's

new attorney advertising rules, the firm's commercials often contained jingles and special effects, including wisps of smoke and blue electrical currents surrounding the firm's name. Firm advertisements also featured dramatizations, comical scenes, and special effects—for instance, depicting Alexander and his partner as giants towering above local buildings, running to a client's house so quickly they appear as blurs, and providing legal assistance to space aliens. Another advertisement depicted a judge in the courtroom and stated that the judge is there "to make sure [the trial] is fair." The firm's ads also frequently included the firm's slogan, "heavy hitters," and phrases like "think big" and "we'll give you a big helping hand." To date, no disciplinary actions have been brought against the firm or its lawyers based on firm advertising. The new rules, however, caused the firm to halt its advertisements for fear of such action.

Plaintiff Public Citizen is a D.C. not-for-profit corporation, with approximately 100,000 members nationwide, including roughly 10,000 in New York. Public Citizen Litigation Group is a division of Public Citizen that conducts, *inter alia*, *pro bono* constitutional litigation in state and federal courts on behalf of its clients. These organizations maintain a website and various blogs, and participate in distributing educational materials on various legal issues to the public.

Defendants-Appellants-Cross-Appellees ("Defendants") are the chief counsels or acting chief counsels of the disciplinary committees whose jurisdiction lies within each of the four Judicial

Appendix A

Departments of the New York Supreme Court, Appellate Division. The Appellate Division is authorized to discipline attorneys for professional misconduct. *See* N.Y. Judiciary Law § 90(2) (McKinney 2009). Pursuant to this authority, the four presiding justices of each of New York's four departments are responsible for adopting disciplinary rules, which set the parameters for professional conduct and provide for the discipline of attorneys violating the rules. The departments have, in turn, appointed the disciplinary committees of which Defendants are a part. These committees undertake investigations into complaints of attorney misbehavior. Following an investigation, Defendants are empowered to take a number of actions with respect to a complaint, including issuing a letter of caution or recommending that formal disciplinary proceedings be started. When formal disciplinary proceedings are deemed warranted, Defendants begin such proceedings in the Appellate Division. Accordingly, Defendants are responsible for enforcing the New York Code of Professional Responsibility and the attorney disciplinary rules promulgated thereunder.

B. The Appellate Division's Adoption of the New Rules

In June 2006, the presiding justices of the four departments of the Appellate Division approved for comment draft amendments to the then-existing rules. A press release explained that the new rules were designed to protect consumers "against inappropriate solicitations or potentially misleading ads, as well as overly aggressive marketing," and to "benefit the bar

by ensuring that the image of the legal profession is maintained at the highest possible level." Following a comment period, the presiding justices issued final rules. These rules were set to take effect on February 1, 2007.

We consider below a subset of these final rules, which we subdivide into two categories. The first group of amendments imposes a series of content-based restrictions:

> N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.0(c):
>
> (c) An advertisement shall not:
>
> (1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending . . .
>
> (3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case . . .
>
> (5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting

> characteristics clearly unrelated to legal competence . . .
>
> (7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.[2]

The second group of amendments imposes a thirty-day moratorium on certain communications following a personal injury or wrongful death event:

N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.52: Solicitation and Recommendation of Professional Employment

> (b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and

2. At the time this action was argued, these provisions appeared at N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.6(c). They appear at their present location without change.

An attorney "advertisement" is defined by N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.0(a) as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."

a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.36: Communication after Incidents Involving Personal Injury or Wrongful Death

(a) In the event of a specific incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a

> filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.
>
> (b) An unsolicited communication by a lawyer or law firm, seeking to represent an injured individual or the legal representative thereof under the circumstance described in paragraph (a) shall comply with [§ 1200.52(e)].[3]

C. The Present Action and District Court Decision

Plaintiffs filed their complaint on February 1, 2007, the date on which the new rules were to take effect. They sought declaratory and injunctive relief from several of the new rules, including all those set forth above. Plaintiffs contended that these rules infringed their First Amendment rights because the rules prohibited "truthful, non-misleading communications that the state has no legitimate interest in regulating." Plaintiffs moved for a preliminary injunction against enforcement of the rules, and Defendants moved to dismiss the

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3. At the time this action was argued, these provisions appeared at N.Y. Comp. Codes R. & Regs., tit. 22, §§ 1200.8 and 1200.41, respectively. Former § 1200.8 appears unchanged at § 1200.52. Former § 1200.41, which now appears at § 1200.36, has changed by shifting between subsections (a) and (b) the class of lawyers and law firms it addresses. The parties have not briefed the relevance, if any, of this change. We accordingly read the change to be immaterial to this appeal.

complaint for, *inter alia*, lack of standing. The District Court (Scullin, *J.*) reserved decision on Plaintiffs' motion and denied Defendants' cross-motion. *Alexander v. Cahill*, No. 5:07-cv-117, 2007 U.S. Dist. LEXIS 29823 (N.D.N.Y. Apr. 23, 2007). Thereafter, the parties stipulated to a set of facts and exhibits that became the basis for competing motions for summary judgment.

On July 23, 2007, the District Court filed its Memorandum-Decision and Order granting partial summary judgment to Plaintiffs and partial summary judgment to Defendants. *Alexander v. Cahill*, 634 F.Supp.2d 239 (N.D.N.Y. 2007). Principally, the District Court found unconstitutional the disputed provisions of § 1200.50(c) set forth above, while concluding that the thirty-day moratorium provisions survived constitutional scrutiny.[4]

Throughout its opinion, the District Court applied the test for commercial speech set forth in *Central Hudson*, which considers whether (1) the speech is protected by the First Amendment; (2) there is a substantial state interest to be achieved by the restriction; (3) the restriction materially advances the

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4. The District Court made several additional rulings that are not at issue in these appeals. Most importantly, the District Court accepted a narrowing construction of the amendments as inapplicable to non-commercial attorney communications. On this basis, the District Court granted Defendants' summary judgment motion as to Plaintiffs' claims regarding application of the rules to non-commercial speech. *Alexander*, 634 F.Supp.2d at 255-56.

state interest; and (4) the restriction is narrowly drawn. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-66, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). The District Court rejected Defendants' claim that "the State of New York could ban attorney advertising that was 'irrelevant, unverifiable, [and] non-informational' without reference to the *Central Hudson* test." *Alexander*, 634 F.Supp.2d at 246 n.4. It concluded: "Defendants have provided no legal support for this proposition, and the Court finds none. Although these characteristics may be evidence that an advertisement is misleading, they do not by themselves constitute a justification for banning commercial speech in the form of attorney advertising." *Id.*

Turning to the amendments that restricted potentially misleading advertisements, including the disputed provisions of § 1200.50(c), the District Court found that Defendants' stated interest in protecting consumers from misleading attorney advertisements was a substantial one. *Id.* at 247-48. Under *Central Hudson's* penultimate prong, which requires that the regulation materially advance the state's interest, however, the District Court concluded that the record was "notably lacking." *Id.* at 248. The District Court gave considerable weight to Defendants' reliance on the New York State Bar Association's Task Force Report on Lawyer Advertising, but concluded that the Report provided sufficient support only for two amendments: the prohibition on the portrayal of judges in attorney advertisements, and the prohibition on the use of trade

names that imply an ability to get results. *Id.* at 248-49. As to the remaining disputed portions of § 1200.50(c), the District Court emphasized that the Task Force Report had recommended disclosure and invigorated enforcement of existing rules, rather than any new content-based restrictions. *Id.* at 249. Finally, the District Court found that the two amendments that materially advanced New York's interest in preventing misleading advertising did not do so in a sufficiently narrowly tailored fashion. The District Court criticized Defendants for failing "to produce any evidence that measures short of categorical bans would not have sufficed to remedy the perceived risks of such advertising being misleading." *Id.* at 250. The District Court therefore concluded that all of the disputed portions of § 1200.50(c) failed the *Central Hudson* test.

With regard to the thirty-day moratorium on contacting victims, the District Court reached the opposite conclusion. The District Court recognized that New York's moratorium is broader than the Florida moratorium sustained by the Supreme Court in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995). Florida's moratorium was limited to direct-mail solicitation, while New York's provisions "extend by their plain language to television, radio, newspaper, and website solicitations that are directed to or targeted at a specific recipient or group of recipients." *Alexander*, 634 F.Supp.2d at 253. Nonetheless, the District Court concluded that New York's moratorium materially advanced state interests in protecting the privacy of citizens and guarding

against the indignity of being solicited for legal services immediately following a personal injury or a wrongful death event, and did so in a reasonably proportionate manner. *Id.* at 253-55. The District Court relied on "an emerging consensus among authorities, state and federal, regarding the desirability of some form of moratorium," citing the Task Force Report's review of direct-mail moratoria in Florida and eight other states, the federal airline disaster moratorium (which prohibits not only direct-mail solicitation, but "unsolicited communications" generally for a forty-five day period, 49 U.S.C. § 1136), and the Supreme Court's opinion in *Florida Bar. Alexander*, 634 F.Supp.2d at 254. The District Court also noted "the existence of 'ample alternative channels' for the public to receive information concerning legal services during the moratorium period—namely, general advertisements in any media, provided they do not reference a specific tragedy." *Id.* (quoting *Florida Bar*, 515 U.S. at 633-34).

DISCUSSION

This case calls on us once again to assess the scope of First Amendment protection accorded to commercial speech, and the measure of evidence a state must present in regulating such speech. Because this action was resolved on summary judgment, we review the District Court's decision *de novo*, drawing all factual inferences in favor of the non-moving party. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003).

Appendix A

The Supreme Court has established a four-part inquiry for determining whether regulations of commercial speech are consistent with the First Amendment:

> [1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).[5]

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5. The Supreme Court has variously described the *Central Hudson* test as having three or four prongs, depending on whether the preliminary inquiry into whether the content to be regulated is protected is counted as a prong. *Compare 44 Liquormart, Inc. v. Rhode Island.*, 517 U.S. 484, 500 n.9, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996) (describing the test as having four prongs), *with Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (describing the test as having three prongs). Defendants' appeal focuses, among other things, on whether certain commercial speech is entitled to First Amendment protection at all. Because the three-part locution of the *Central Hudson* test assumes such an inquiry, we adopt the four-part locution throughout.

Appendix A

A. The Disputed Provisions Regulate Commercial Speech Protected by the First Amendment

Defendants' appeal challenges the District Court's threshold conclusion as to the first prong of this inquiry—that the First Amendment protects advertising that is irrelevant, unverifiable, and non-informational. Although they do not dispute that New York's thirty-day moratorium provisions regulate protected commercial speech, Defendants argue strenuously to us that New York's content-based restrictions regulate speech that is not entitled to First Amendment protection at all.

The Supreme Court first recognized attorney advertising as within the scope of protected speech in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), in which the Court invalidated a ban on price advertising for what the Court deemed "routine" legal services. In so doing, the Court reserved the question of whether similar protection would extend to "advertising claims as to the quality of services [that] are not susceptible of measurement or verification." *Id.* at 383.

In the years since *Bates*, the Supreme Court has offered differing, and not always fully consistent, descriptions as to what constitutes protected commercial speech, particularly with respect to attorney advertising. Speaking generally, the Supreme Court has said that states may impose regulations to ensure that "the stream of commercial information flow[s] cleanly as well

as freely." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). But this Court has nonetheless observed that there are "doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved. In particular, these decisions have created some uncertainty as to the degree of protection for commercial advertising that lacks precise informational content." *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998)

In the end, we agree with the District Court that, with one exception discussed below, the content-based restrictions in the disputed provisions of § 1200.50(c) regulate commercial speech protected by the First Amendment. In almost every instance, descriptions of the first prong of the *Central Hudson* test are phrased in the negative, and the only categories that *Central Hudson*, and its *sequellae*, clearly excludes from protection are speech that is false, deceptive, or misleading, and speech that concerns unlawful activities. *See, e.g.*, *Florida Bar*, 515 U.S. at 623-24 ("[T]he government may freely regulate commercial speech that concerns unlawful activity or is misleading. Commercial speech that falls into neither of those categories . . . may be regulated if the government satisfies [*Central Hudson's* remaining three prongs]." (citation omitted)); *Ibanez v. Fl. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994) ("[O]nly false, deceptive, or misleading commercial speech may be banned."). The Supreme Court has also emphasized that "States may not place

an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); *see also, e.g.*, *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 100-01, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 479, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 644, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985). We conclude from these precedents that the *Central Hudson* analysis applies to regulations of commercial speech that is only *potentially* misleading.[6]

The speech that Defendants' content-based restrictions seeks to regulate—that which is irrelevant, unverifiable, and non-informational—is not inherently false, deceptive, or misleading. Defendants' own press release described its proposed rules as protecting consumers against "*potentially* misleading ads." This is insufficient to place these restrictions beyond the scope of First Amendment scrutiny. [7]

6. Moreover, in this Court's lead opinion on the matter, we have stated generally, in the context of product advertising, that "minimal information, conveyed in the context of a proposal of a commercial transaction, suffices to invoke the protections for commercial speech, articulated in *Central Hudson*." *Bad Frog Brewery*, 134 F.3d at 97.

7. Defendants contend that their relevance and verifiability requirements were, in fact, adopted by the

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There is one exception to this conclusion. Subsection 1200.50(c)(3) prohibits "the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case." N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.50(c)(3). The District Court invalidated § 1200.50(c)(3) in its entirety. *Alexander*, 634 F.Supp.2d at 249. Plaintiffs acknowledge, however, that they intended to challenge only the first clause of this subsection—prohibiting portrayals of judges—and they do not oppose Defendants' appeal seeking reinstatement of the prohibition on fictitious firms.

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Supreme Court by way of summary dismissal. *Comm. on Professional Ethics & Conduct of the Iowa State Bar Assoc. v. Humphrey*, 355 N.W.2d 565 (Iowa 1984), *vacated and remanded*, 472 U.S. 1004, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985), *after remand*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed for want of a substantial federal question*, 475 U.S. 1114, 106 S. Ct. 1626, 90 L. Ed. 2d 174 (1986). We do not find the Iowa Supreme Court's analysis in *Humphrey* persuasive. And we comment on *Humphrey* also to draw attention to the well-established limits on the precedential value of summary dismissals of this kind. The Supreme Court has long recognized that the precedential value of a summary dismissal is limited to "the precise issues presented and necessarily decided by" the dismissal. *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977). Accordingly, we need not conclude that New York's content-restrictions are permissible simply because the Iowa Supreme Court upheld Iowa's regulations summarily following an earlier remand.

The provision prohibiting advertisements including fictitious firms is susceptible to more than one interpretation. But we need not decide whether it would be constitutional to prohibit dramatizations in which an advertising law firm portrays itself arguing against a fictitious opposing counsel. At oral argument, the Attorney General, representing the Defendants, suggested a narrower interpretation of this regulation. He asked that we construe this language as applying only to situations in which lawyers from different firms give the misleading impression that they are from the same firm (i.e., "The Dream Team"). (Oral Arg. tilde 12:38:25) We accept this interpretation. So read, this portion of § 1200.50(c)(3) addresses only attorney advertising techniques that are actually misleading (as to the existence or membership of a firm), and such advertising is not entitled to First Amendment protection. *See Florida Bar*, 515 U.S. at 623-24. Accordingly, and subject to the above-mentioned construction, we reverse the District Court's invalidation of that portion of § 1200.50(c)(3) that prohibits advertisements that include fictitious firms.

Having concluded that the remainder of the disputed regulations falls within the zone of protected commercial speech, we turn to the rest of the *Central Hudson* test. The Supreme Court has explained that "[c]ommercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Shapero*, 486 U.S. at 472 (quotation

marks and alteration omitted). "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Edenfield v. Fane*, 507 U.S. 761, 770, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) (quotation marks and alteration omitted). We apply the three remaining prongs of *Central Hudson*, in turn, to each of the two categories of regulations set forth above.

B. Central Hudson and the Content-Based Regulations

1. Substantial Interest

Under the second prong of *Central Hudson*, the State must identify "a substantial interest in support of its regulation[s]." *Florida Bar*, 515 U.S. at 624. "[T]he *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions." *Id.* at 624 (quotation marks omitted). Before the District Court and again on appeal, Defendants proffered a state interest in "prohibiting attorney advertisements from containing deceptive or misleading content." (Appellants' Br. 32) The report by the New York State Bar Association's Task Force on Lawyer Advertising (hereinafter, the "Task Force Report" or "Report"), which the State considered in formulating its new rules and which constitutes the bulk of the record on appeal, indicates that this is a proper and genuinely asserted interest. The Task Force Report identified protecting the public "by prohibiting advertising and solicitation practices that disseminate false or misleading information" as one of its key concerns. (Task Force Report 1-2) This state interest is

substantial—indeed, states have a generally unfettered right to prohibit inherently or actually misleading commercial speech. *See, e.g.*, *Edenfield*, 507 U.S. at 769 ("[T]here is no question that [the State's] interest in ensuring the accuracy of commercial information in the marketplace is substantial."); *In re R.M.J.*, 455 U.S. at 207 ("States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice."). The disputed regulations codified at § 1200.50(c) therefore survive the second prong of the *Central Hudson* analysis.[8]

Defendants also assert an interest in "protecting the legal profession's image and reputation." (Appellants' Reply 30) In *Florida Bar*, the Supreme Court recognized a substantial interest "in preventing the erosion of confidence in the [legal] profession." *Florida*

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8. Defendants at times assert an interest in "ending attorney advertising that is potentially deceptive or misleading." (Appellants' Br. 36) It is not clear, however, that a state has a substantial interest in prohibiting *potentially* misleading advertising, as opposed to inherently or actually misleading advertising. "If the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant" the State's burden. *Ibanez*, 512 U.S. at 146 (internal quotation marks and citation omitted). Moreover, it is unclear what harm *potentially* misleading advertising creates, and the state bears the burden of proving "that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Florida Bar*, 515 U.S. at 626 (quotation marks omitted). We need not resolve this issue in order to decide this case, and so we leave it for a future case.

Bar, 515 U.S. at 635. Defendants explain that their interest in preventing misleading attorney advertising is "inextricably linked to its overarching interest" in maintaining attorney professionalism and respect for the bar. (Appellants' Reply 30) This interest also supports the disputed regulations.[9]

2. Materially Advanced

"The penultimate prong of the *Central Hudson* test requires that a regulation impinging upon commercial expression 'directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.'" *Edenfield*, 507 U.S. at 770 (quoting *Central Hudson*, 447 U.S. at 564). The state's burden with respect to this prong "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Florida Bar*, 515 U.S. at 626 (quotation marks omitted). Moreover, "[i]f the protections afforded commercial speech are to retain

9. In defending the restriction on testimonials by clients with pending matters, Defendants assert a state interest in preserving the integrity of the attorney-client relationship. (Appellants' Br. 39-40) Defendants did not assert this interest before the District Court, however, and so we do not consider it on appeal. *See Virgilio v City of New York*, 407 F.3d 105, 116 (2d Cir. 2005) ("In general we refrain from passing on issues not raised below.") (quotation marks omitted).

their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant" this burden. *Ibanez*, 512 U.S. at 146 (internal quotation marks and citation omitted).

Invalidating a regulation of commercial speech for lack of sufficient evidence under this prong of *Central Hudson* does not foreclose a similar regulation being enacted validly in the future. Rather, such invalidation returns the matter to the applicable legislating body and "forces [that body] to take a 'second look' with the eyes of the people on it." Guido Calabresi, *Foreward: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 Harv. L. Rev. 80, 104 (1991); *see also Benjamin v. Jacobson*, 172 F.3d 144, 190 (2d Cir. 1999) (en banc) (Calabresi, *J.*, concurring in the result).

In defending the disputed § 1200.50(c) provisions, Defendants rely on three sources of evidence: (1) "history, consensus, and simple common sense," *Florida Bar*, 515 U.S. at 628 (quotation marks omitted), including regulations of attorney advertising in other states; (2) existing and unchallenged rules already in New York's Code of Professional Responsibility targeting advertising similar to that targeted by the new amendments; and (3) the New York State Bar Association's Task Force Report. Defendants have not submitted any statistical or anecdotal evidence of consumer problems with or complaints of the sort they seek to prohibit. Nor have they specifically identified any studies from other jurisdictions on which the state

relied in implementing the amendments. *See Alexander*, 634 F.Supp.2d at 248. Against this background, we test each of the disputed § 1200.50(c) provisions.

a. Subsection 1200.50(c)(1): Client Testimonials

This subsection prohibits advertisements that include "an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending." N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.50(c)(1). The Task Force Report observed that testimonials can be misleading because they may suggest that past results indicate future performance. (Task Force Report 26-27) The Task Force Report, however, did not recommend outright prohibitions of all testimonials on this basis. Instead, as the District Court observed, the Task Force Report "recommended a different approach." *Alexander*, 634 F.Supp.2d at 249. The Report suggested "strengthening the rules governing testimonials to prohibit the use of an actor or spokesperson who is not a member or employee of the advertising lawyer or law firm *absent disclosure thereof.*" (Task Force Report 27) (emphasis added). The Task Force noted, moreover, that "it would be an improper restriction on a client's free speech rights to prohibit client testimonials outright." (*Id.*) The Task Force Report therefore does not support Defendants' assertion that prohibiting testimonials from current clients will materially advance an interest in preventing misleading advertising. Indeed, the Report "contradicts, rather than strengthens, the Board's submissions." *Edenfield*, 507 U.S. at 772.

Nor does consensus or common sense support the conclusion that client testimonials are inherently misleading. Testimonials may, for example, mislead if they suggest that past results indicate future performance—but not all testimonials will do so, especially if they include a disclaimer. The District Court properly concluded that Defendants failed to satisfy this prong of *Central Hudson* with respect to client testimonials.

b. Subsection 1200.50(c)(3): Portrayal of a Judge

This subsection prohibits "the portrayal of a judge." N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.50(c)(3).[10] The Task Force Report observes that "a communication that states or implies that the lawyer has the ability to influence improperly a court" is "likely to be false, deceptive, or misleading." (Task Force Report, App. I, 11) The District Court found this comment to be persuasive evidence that a ban on portrayals of judges would materially advance the State's interest in preventing misleading advertising. We disagree. Although it seems plainly true that implying an ability to influence a court is likely to be misleading, Defendants have failed to draw the requisite connection between that common sense observation and portrayals of judges in advertisements generally. The advertisement in which Alexander & Catalano use the portrayal of a judge, for

10. Subsection 1200.50(c)(3) also includes the prohibition on fictitious law firms discussed in section *A* above.

instance, depicts a judge in the courtroom and states that the judge is there "to make sure [the trial] is fair." This sort of advertisement does not imply an ability to influence a court improperly. It is not misleading; an advertisement of this sort may, instead, be informative. We believe the Task Force Report fails to support Defendants' prohibition on portrayals of judges[11] and conclude that Defendants have not met their burden with respect to the wholesale prohibition of portrayals of judges. This prohibition consequently must fall.

c. *Subsection 1200.50(c)(5): Irrelevant Techniques*

This subsection prohibits advertisements that "rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence." N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.50(c)(5). Defendants note that the New York Code of Professional Responsibility has long declared that the purpose of attorney advertising is to "educate the public to an

11. New York's existing rule prohibiting attorneys from stating or implying that they are able "to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official," N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.58(e)(1), does not support the new rule. On the contrary, this rule mirrors the Task Force Report's remarks, and does not suggest that any and all portrayals of judges imply the capacity to exercise improper influence over a court or other government body.

awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel." (Appellants' Br. 33-34) (quotation marks omitted) Defendants contend that their rule excluding attention-getting techniques unrelated to attorney competence reflects this principle and so materially advances "New York's interest in factual, relevant attorney advertisements." (Appellants' Br. 35)

A rule barring irrelevant advertising components certainly advances an interest in keeping attorney advertising factual and relevant. But this interest is quite different from an interest in preventing misleading advertising. Like Defendants' claim that the First Amendment does not protect irrelevant and unverifiable components in advertising, Defendants here appear to conflate *irrelevant* components of advertising with *misleading* advertising. These are not one and the same. Questions of taste or effectiveness in advertising are generally matters of subjective judgment. Moreover, as the Task Force Report acknowledged, "Limiting the information that may be advertised . . . assumes that the bar can accurately forecast the kind of information that the public would regard as relevant." (Task Force Report, App. I, 8)

Defendants have introduced no evidence that the sorts of irrelevant advertising components proscribed by subsection 1200.50(c)(5) are, in fact, misleading and so subject to proscription. Significantly, the Task Force Report expressly recognized that "communications involving puffery and claims that cannot be measured

or verified" were not specifically addressed in its proposed rules, although such communications would already be prohibited "to the extent that they are false, deceptive or misleading." (Task Force Report, App. I, 9) Insofar as the Task Force Report touched on style and advertising gimmicks designed to draw attention, its recommendations were hortatory only. (*See* Task Force Report 70) (quoting the Monroe County Bar Association Project exhorting—but not requiring—lawyers and firms to include only "factually accurate and objectively verifiable" information in their advertisements, and to minimize devices such as puffery in favor of information "relevant to the thoughtful selection of counsel").

Moreover, the sorts of gimmicks that this rule appears designed to reach—such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects—do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly that they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe—purely as a matter of "common sense"—that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics. Indeed, some of these gimmicks, while seemingly irrelevant, may actually serve "important communicative functions: [they] attract[ ] the attention of the audience to the

advertiser's message, and [they] may also serve to impart information directly." *Zauderer*, 471 U.S. at 647. Plaintiffs assert that they use attention-getting techniques to "communicate ideas in an easy-to-understand form, to attract viewer interest, to give emphasis, and to make information more memorable." (Appellees' Br. 36) Defendants provide no evidence to the contrary; nor do they provide evidence that consumers have, in fact, been misled by these or similar advertisements. Absent such, or similar, evidence, Defendants cannot meet their burden for sustaining subsection 1200.50(c)(5)'s prohibition under *Central Hudson*.

d. Section 1200.50(c)(7): Nicknames, Mottos, and Trade Names

This subsection bars advertisements "utiliz[ing] a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter." N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.50(c)(7). We conclude, once again, that the evidence on which Defendants rely fails to support this regulation.

There is a compelling, commonsense argument that, given the uncertainties of litigation, names that imply an ability to obtain results are usually misleading. The Task Force Report made precisely this observation, stating in its recommendations that "the use of dollar signs, the terms 'most cash' or 'maximum dollars,' or like terms that suggest the outcome of the legal matter" is "likely to be false, deceptive or misleading." (Task

Force Report, App. I, 11-12) Like its recommendations on irrelevant advertising techniques, however, the Task Force Report did not recommend outright prohibition of all such trade names or mottos—it simply acknowledged that such names are often misleading. Defendants' rule, by contrast, goes further and prohibits such descriptors—including, according to the Attorney General, Alexander & Catalano's own "Heavy Hitters" motto—even when they are not actually misleading. The Task Force Report therefore fails to support Defendants' considerably broader rule.

Nor are we persuaded as to this rule's constitutionality by reference to *Friedman v. Rogers*, 440 U.S. 1, 99 S. Ct. 887, 59 L. Ed. 2d 100 (1979), in which the Supreme Court upheld a prohibition on optometrist trade names. There is doubt as to *Friedman's* continued vitality. *Friedman* preceded *Central Hudson* by nine years and did not employ *Central Hudson's* multi-factor First Amendment analysis. As this Court previously observed in *Bad Frog Brewery*, subsequent Supreme Court precedent has undermined *Friedman* and moved in the direction of greater First Amendment protection for "a logo or a slogan that conveys no information, other than identifying the source of the product, but that serves, to some degree, to 'propose a commercial transaction.'" 134 F.3d at 96 (quoting *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 340, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986)). Accordingly, we decline to rely solely on *Friedman* to uphold § 1200.50(c)(7) given the subsequent precedential developments establishing

more specific and demanding burdens of evidence on the state.

Moreover, in *Friedman* itself, the state marshaled substantially stronger and more specific evidence supporting its prohibition on trade names than was done in this case. *See, e.g.*, *Friedman*, 440 U.S. at 13-15. There is a dearth of evidence in the present record supporting the need for § 1200.50(c)(7)'s prohibition on names that imply an ability to get results when the names are akin to, and no more than, the kind of puffery that is commonly seen, and indeed expected, in commercial advertisements generally. Defendants have once again failed to provide evidence that consumers have, in fact, been misled by the sorts of names and promotional devices targeted by § 1200.50(c)(7), and so have failed to meet their burden for sustaining this prohibition under *Central Hudson*.

3. Narrowly Tailored

The final prong of *Central Hudson* asks whether the "fit" between the goals identified (the state's interests) and the means chosen to advance these goals is reasonable; the fit need not be perfect. *Florida Bar*, 515 U.S. at 632. As this Court has explained, "'laws restricting commercial speech . . . need only be tailored in a *reasonable manner* to serve a substantial state interest in order to survive First Amendment scrutiny.'" *N.Y. State Ass'n of Realtors v. Shaffer*, 27 F.3d 834, 842 (2d Cir. 1994) (quoting *Edenfield*, 507 U.S. at 767). Nonetheless, "restrictions upon [potentially deceptive

speech] may be no broader than reasonably necessary to prevent the deception." *In re R.M.J.*, 455 U.S. at 203. "[T]he existence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *Florida Bar*, 515 U.S. at 632 (quotation marks and alteration omitted). More precisely, the Supreme Court has emphasized that "States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203. And the Supreme Court has also affirmed that a state may not impose a prophylactic ban on potentially misleading speech merely to spare itself the trouble of "distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646.

On this basis, even if we were to find that all of the disputed Section 1200.50(c) restrictions[12] survived scrutiny under *Central Hudson's* third prong, each would fail the final inquiry because each wholly prohibits a category of advertising speech that is *potentially* misleading, but is not inherently or actually misleading in all cases. Contrary to Defendants' assertions, the fact that New York's rules do also permit substantial

12. Excepting, of course, the prohibition on fictitious firms, which, as explained in section *A* above, addresses inherently misleading advertising that need not be scrutinized under the remaining *Central Hudson* prongs.

information in attorney advertising does not render the disputed provisions any less categorical. Significantly, *Zauderer* deemed a rule barring illustrations a "blanket ban." *Zauderer*, 471 U.S. at 648. And New York's rules prohibiting, *inter alia*, all testimonials by current clients, all portrayals of judges, and all depictions of lawyers exhibiting characteristics unrelated to legal competence are similarly categorical. Because these advertising techniques are no more than potentially misleading, the categorical nature of New York's prohibitions would alone be enough to render the prohibitions invalid.

Moreover, "nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the [disputed provisions] cannot be combated by any means short of a blanket ban." *Zauderer*, 471 U.S. at 648; *see also Peel*, 496 U.S. at 109 (noting that the mere potential for misleading "does not satisfy the State's heavy burden of justifying a categorical prohibition"). As the District Court observed, the State could have, for example, required disclaimers similar to the one already required for fictional scenes. *Alexander*, 634 F.Supp.2d at 250; *see* N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.50(c)(4) (fictional scenes). Nothing in the record suggests that such disclaimers would have been ineffective.

The materials in the record show, instead, that disclaimers and other regulations short of content-based bans were in fact suggested. The Task Force "agreed at the outset to deal in practical solutions (*i.e.*, generally strengthening existing disclaimers and requiring further

disclosures) without adding content-based restrictions." (Task Force Report 2) Nearly all of the Report's recommendations followed this general rule. And in comments responding to New York's draft rules, the Federal Trade Commission, "which has a long history of reviewing claims of deceptive advertising," *Peel*, 496 U.S. at 105, similarly stated its belief that New York could adequately protect consumers "using less restrictive means such as requiring clear and prominent disclosure of certain information." (Letter from the FTC's Office of Policy Planning, Bureau of Consumer Protection, and Bureau of Economics to Michael Colodner, Office of Court Administration (Sept. 14, 2006))

Defendants have failed to carry their burden with respect to *Central Hudson's* final prong. We therefore conclude, like the District Court, that the disputed portions of subsections 1200.50(c)(1), (3), (5), and (7) are unconstitutional. In so doing, we return this matter to the Appellate Division, where that body may "take a 'second look' with the eyes of the people on it. Calabresi, *Foreward*, *supra*, at 104.

C. Central Hudson and the Moratorium Provisions

Plaintiffs' cross-appeal challenges the District Court's decision upholding New York's time-limited moratorium on solicitation of accident victims or their families. "In cases where a legal filing is required within thirty days, the moratorium is limited to a fifteen-day cooling off period." *Alexander*, 634 F.Supp.2d at 253. New York's moratorium provisions apply to all media

through which an attorney might initiate communication "directed to, or targeted at, a specific recipient or group of recipients." N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.52(b).

Consistent with the regulations as written and with counsel's concessions at oral argument, we construe the moratorium provision as inapplicable to (a) broad, generalized mailings (Oral Arg. tilde 12:06:18); (b) general advertisements conveying an attorney's experience in handling personal-injury suits, even when these advertisements appear near news stories in a newspaper that the attorney knows will be filled with coverage of a particular accident (Oral Arg. ~ 12:02:38-12:03:00)[13]; or (c) advertisements informing readers of an attorney's past experience with a particular product where that product has caused repeated personal-injury problems (as with the Dalkon Shield advertisement at issue in *Zauderer*). (Oral Arg. ~ 12:04:11)

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13. It is unclear whether the moratorium provisions apply to "meta tagging," a process by which one can insert non-visible HTML code into a website or web advertisement. By use of a meta tag, for example, a lawyer can design a general advertisement that appears when one searches for information regarding a specific incident. The parties have not briefed whether the moratorium provisions prohibit meta tagging, or if they do prohibit meta tagging, whether the prohibition is constitutional. Accordingly, we express no opinion on either question.

We turn now to the remaining *Central Hudson* inquiries relevant to the moratorium provision.

1. State Interest

In *Florida Bar*, the Supreme Court recognized as a substantial state interest "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers." *Florida Bar*, 515 U.S. at 624. That case considered a thirty-day moratorium on direct-mail solicitation of accident victims (or their families). This case similarly involves a moratorium on contacting accident victims (and their families). The Task Force Report, which Defendants considered, recommended a limited moratorium because "the cooling off requirement would be beneficial in removing a source of annoyance and offense to those already troubled by an accident or similar occurrence." (Task Force Report 62-63) *Florida Bar* makes clear that Defendants' stated interest is substantial, and the Task Force Report indicates that that interest is genuinely asserted. The moratorium provisions thus meet the requirements of *Central Hudson's* substantial interest prong.

2. Materially Advanced

Florida Bar upheld Florida's moratorium rule, which is similar to the New York provisions before us. Several other states have since adopted analogous regulations prohibiting targeted solicitation of accident

victims for specific periods of time.[14] The Task Force Report, based in part on the practices of these states, recommended a fifteen-day "cooling-off period" during which direct-mail solicitation of accident victims would be prohibited. (Task Force Report, App. I, 4) New York's moratorium provisions seek to address the same harms that the *Florida Bar* Court recognized in upholding a

14. *See, e.g.*, Ariz. Rules of Prof'l Conduct R. 7.3(b)(3) (prohibiting "written, recorded or electronic communication or by in-person, telephone or real-time electronic" solicitation where "the solicitation relates to a personal injury or wrongful death and is made within thirty (30) days of such occurrence"); Conn. Rules of Prof'l Conduct R. 7.3(b)(5) (imposing a forty-day moratorium on "written or electronic communication concern[ing] an action for personal injury or wrongful death"); Ga. Rules of Prof'l Conduct R. 7.3(a)(3) (imposing a thirty-day moratorium on "written communication concern[ing] an action for personal injury or wrongful death"); La. Rules of Prof'l Conduct R. 7.3(b)(iii)(C) (imposing a thirty-day moratorium on communication "concern[ing] an action for personal injury or wrongful death"); Mo. Rules of Prof'l Conduct 7.3(c)(4) (prohibiting written solicitation, including by e-mail, "concern[ing] an action for personal injury or wrongful death . . . if the accident or disaster occurred less than 30 days prior to the solicitation"); Tenn. Rules of Prof'l Conduct R. 7.3(b)(3) (prohibiting solicitation of "professional employment from a potential client by written, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact" if "the communication concerns an action for personal injury, worker's compensation, wrongful death, or otherwise relates to an accident or disaster involving the person to whom the communication is addressed . . . unless the accident or disaster occurred more than thirty (30) days prior to the mailing or transmission of the communication").

thirty-day ban on direct-mail solicitations. And the New York provisions seek to address those harms through similar means—a time-limited moratorium on targeted solicitation of potential clients. *Florida Bar* makes clear that such means materially advance the state's interest. We conclude, therefore, that Defendants have met their burden under this prong of *Central Hudson*. *See Moore v. Morales*, 63 F.3d 358, 361-62 (5th Cir. 1995) (relying largely on *Florida Bar* in upholding a rule prohibiting attorneys, physicians, and other professionals from soliciting accident victims within thirty days following the accident).

3. Narrowly Tailored

Were New York's moratorium provisions limited to direct-mail solicitation, there would be little question as to their constitutionality. *See Falanga v. State Bar of Georgia*, 150 F.3d 1333, 1340-41 (11th Cir. 1998). But New York's moratorium is not so limited. As the District Court recognized, "The moratorium provisions in this case extend by their plain language to television, radio, newspaper, and website solicitations that are directed to or targeted at a specific recipient or group of recipients." *Alexander*, 634 F.Supp.2d at 253.

The Supreme Court has in some circumstances favored a technology-specific approach to the First Amendment. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) ("Cable television, like broadcast media, presents unique problems, which inform our

assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts."); *Reno v. ACLU*, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) ("[E]ach medium of expression may present its own problems." (quotation marks and alteration omitted)); *FCC v. League of Women Voters of Ca.*, 468 U.S. 364, 377, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984) ("[W]e have recognized that 'differences in the characteristics of new media justify differences in the First Amendment standards applied to them.'" (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969))).[15] Different media may present unique attributes that merit a tailored First Amendment analysis. *But see* Jim Chen, *Conduit-Based Regulation of Speech*, 54 Duke L.J. 1359, 1360 (2005) ("[A] constitutional jurisprudence that minimizes reliance on conduit-based distinctions best protects free speech.").

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15. *See also Bolger v Youngs Drug Prods. Corp.*, 463 U.S. 60, 74, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983) ("[T]he special interest of the federal government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication."); *FCC v. Pacifica Found.*, 438 U.S. 726, 748, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems."); *S E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it . . . .").

But the differences among media may or may not be relevant to the First Amendment analysis depending on the challenged restrictions. *Compare Sable Commc'ns of Ca., Inc. v. FCC*, 492 U.S. 115, 128, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989) ("Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it."), *with Reno*, 521 U.S. at 875-76 (likening regulations seeking to protect minors from harmful material on the Internet to regulations on obscene commercial telephone recordings), *and Sable Commc'ns*, 492 U.S. at 125 (likening obscene commercial telephone recordings to obscene commercial mailings); *cf. Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 473, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988) ("Our lawyer advertising cases have never distinguished among various modes of written advertising to the general public.").

In the context before us, we eschew a technology-specific approach to the First Amendment and conclude that New York's moratorium provisions—as we construe them—survive constitutional scrutiny notwithstanding their applicability across the technological spectrum. We focus first on the potential differences among media as to the degree of affirmative action needed to be taken by the targeted recipient to receive the material Plaintiffs seek to send. For many media forms, it is about the same. Thus, to us, the affirmative act of walking to one's mailbox and tearing open a letter seems no greater than walking to one's front step and picking up the paper or turning on a knob on a television or radio.

Appendix A

It is true that the Internet may appear to require more affirmative acts on the part of the user in order to recover content (and is therefore perhaps entitled to greater First Amendment protection insofar as users are soliciting information, rather than being solicited). But regardless of whether this characterization was once accurate, it no longer is so. E-mail has replaced letters; newspapers are often read online; radio streams online; television programming is broadcast on the Web; and the Internet can be connected to television. *See* Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245, 248 (2003) ("[T]he impending shift of all networks to packet switched technologies promises to cause all of the distinctions based on the means of conveyance and the type of speech conveyed to collapse entirely."). Furthermore, Internet searches do not bring a user immediately to the desired result without distractions. Advertisements may appear with the user's search results; pop-up ads appear on web pages; and Gmail (Google's e-mail service) creates targeted advertising based on the keywords used in one's e-mail. In such a context, an accident victim who describes her experience in an e-mail might very well find an attorney advertisement targeting victims of the specific accident on her computer screen.[16]

16. At present, Gmail's algorithm for placing targeted advertisements next to e-mail messages omits such ads where an e-mail message mentions a catastrophic event or tragedy. *See* More on Gmail and Privacy, Jan. 2007, http://mail.google.com/mail/help/about_privacy.html. It is by no means certain, however, (a) that Google will continue such a policy, (b) that the algorithm runs without flaws, or (c) that other e-mail providers will exercise similar good taste.

States are increasingly responding to these expanded and expanding roles of the Internet. Several already apply existing attorney professional responsibility rules to electronic and Internet advertisements and solicitations. *See* Amy Haywood & Melissa Jones, *Navigating a Sea of Uncertainty: How Existing Ethical Guidelines Pertain to the Marketing of Legal Services over the Internet*, 14 Geo. J. Legal Ethics, 1099, 1113 (2001) ("[I]t can be assumed that Internet use in the context of legal marketing will generally invoke all ethics rules relating to advertising and solicitation.").[17] Texas and Florida have also added language to their disciplinary rules specifically to address attorney solicitation via the Internet.[18] The New York Task Force Report reached the same conclusion. The Report repeatedly stated that "on-line advertisements and websites are not materially different than typical" printed advertisements, and that the rules should be enforced equally across media. (Task Force Report 54-55) In so doing, the Report "demonstrate[d] that the harms it recites are real and its restriction will in fact alleviate them to a degree." *Florida Bar*, 515 U.S. at 626 (quotation marks omitted).

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17. *See, e.g.*, S.C. Ethics Op. 99-04 (1999) (advertising); Mass. Ethics Op. 98-2 (1998) (advertising and solicitation); Iowa Ethics Op. 96-1 (1996) (advertising); Pa. Ethics Op. 96-17 (1996) (advertising).

18. *See Amendments to Rules Regulating the Florida Bar—Advertising Rules*, 762 So. 2d 392 (Fla. 1999); Tex. Disciplinary Rules of Prof'l Conduct, Interpretive Cmt. 17 (1996, rev. May 2003).

Accordingly, we conclude that even acknowledging that differences among media may be significant in some First Amendment analyses, they are not so in this case. Three aspects of the Supreme Court's analysis in *Florida Bar* are of particular relevance to our determination that the harms identified in that case, and put forth by Defendants in this case, are just as compelling with respect to targeted attorney advertisements on television, radio, newspapers, and the Internet as they are in justifying a ban on targeted mailings of attorney advertisements.

a. Porcelain Hearts

The Supreme Court has recognized the particular sensitivity of people to targeted (plaintiff's) attorney advertisements during periods of trauma. To the extent that the attorney advertisements, regardless of the media through which they are communicated, are directed toward the same sensitive people, there is no reason to distinguish among the mode of communication. Depending on the individual recipient, the printed word may be a likely to offend as images on a screen or in newspapers.

In *Florida Bar*, the Court recognized the state's "substantial interest . . . in protecting injured Floridians from invasive conduct by lawyers." 515 U.S. at 635. As the dissent in *Florida Bar* pointed out, the primary distinction between the targeted letters at issue in *Florida Bar* and the untargeted letters at issue in *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 108

S. Ct. 1916, 100 L. Ed. 2d 475 (1988), was that "victims or their families will be offended by receiving a [targeted] solicitation during their grief and trauma." *Florida Bar*, 515 U.S. at 638. The dissent argued that the majority should not "allow restrictions on speech to be justified on the ground that the expression might offend the listener." *Id.*

But the majority of the Supreme Court in *Florida Bar* held otherwise. It focused on a subset of the public in analyzing the First Amendment: essentially, a First Amendment analogue to tort law's thin-skull plaintiffs, those who have a "porcelain heart." Some accident victims and their families might welcome targeted solicitations that inform them of their legal rights immediately after the accident (particularly when insurance companies may already be knocking on their doors). Other accident victims and their families might be perturbed—but not outraged—by the targeted solicitations. The Supreme Court, however, tailored First Amendment law, in the context of attorney solicitations, to the most sensitive members of the public. It is with these porcelain hearts in mind that we must evaluate New York's moratorium.

b. Wemmick's Castle[19]

In addition to a heightened concern for public sensitivity to potentially offensive attorney communications,

19. In Charles Dickens' "Great Expectations," the character of Mr. Wemmick has a home that is literally his castle, complete with a drawbridge and moat that are used to separate his lives inside and outside the home.

the Court in *Florida Bar* upheld the moratorium in part because of its belief that people should be given more of an option to avoid offensive speech in the privacy of their homes. *See Florida Bar*, 515 U.S. at 625 ("[W]e have consistently recognized that the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." (quotation marks and alterations omitted)).

In this respect, the Court was adhering to a long-held position:

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738, 90 S. Ct. 1484, 1491, 25 L.Ed.2d 736 (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Frisby v. Schultz, 487 U.S. 474, 484-85, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) (some internal citations

omitted); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737, 90 S. Ct. 1484, 25 L. Ed. 2d 736 ("The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another."). In *Rowan*, the Supreme Court "categorically reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another," and held that "[t]he asserted right of a mailer . . . stops at the outer boundary of every person's domain." *Id.* at 738.

Yet, a letter in a mailbox is no more intrusive than the newspaper in the mailbox, the e-mail in one's inbox, the television in the living room, the radio in the kitchen, or the Internet in the study. Arguably, mail is directly targeted at a residence, whereas television, radio, and the Internet may be viewed outside the home. But the Court has seemingly not focused on this distinction, and, instead, has held that the home should be protected from offensive language that disturbs domestic tranquility through the airwaves:

> Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot

> completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

FCC v. Pacifica Found., 438 U.S. 726, 748-49, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) (internal citation omitted) (upholding the FCC's regulation of radio broadcast); *cf. Rowan*, 397 U.S. at 736-37 ("[A] mailer's right to communicate must stop at the mailbox of an unreceptive addressee."). Once again, we find no reason to distinguish among these media for our First Amendment analysis.

c. Lawyers' Reputations

Finally, *Florida Bar* recognized the state's "substantial interest . . . in preventing the erosion of confidence in the [legal] profession that . . . repeated invasions [of privacy by lawyers] have engendered." 515 U.S. at 635. The *Florida Bar* court distinguished between two kinds of direct-mail advertisements: (1) those that cause offense to the recipient and whose harm can "be eliminated by a brief journey to the trash can," *id.* at 631; *see also Bolger*, 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (rejecting federal ban on direct-mail advertisements for contraceptives), and (2) those whose harmful effects extend beyond the recipient by,

for example, tarnishing the reputation of a professional group. *See Florida Bar*, 515 U.S. at 631 ("The Bar is concerned not with citizens' 'offense' in the abstract, but with the demonstrable detrimental effects that such 'offense' has on the profession it regulates. Moreover, the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents. Throwing the letter away shortly after opening it may minimize the latter intrusion, but it does little to combat the former." (internal citations omitted)). A solicitation that offends is not likely to be any less detrimental to the reputation of lawyers when spoken aloud, displayed on a computer screen, or conveyed by television.

Accordingly, we conclude that ads targeting certain accident victims that are sent by television, radio, newspapers, or the Internet are more similar to direct-mail solicitations, which can properly be prohibited within a limited time frame, than to "an untargeted letter mailed to society at large," which "involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession" as direct mail solicitations. *Florida Bar*, 515 U.S. at 630.

Moreover, we do not find constitutional fault with the 30-day time period during which attorneys may not solicit potential clients in a targeted fashion. As with *Florida Bar's* "short temporal ban," New York's moratorium permits attorneys to advertise to the

general public their expertise with personal injury or wrongful death claims. It thereby fosters reaching the accident victims, so long as these victims are not specifically targeted. It further allows accident victims to initiate contact with attorneys even during the thirty days following an accident. *See Florida Bar*, 515 U.S. at 633. In fact, as *amici* New York State Bar Association point out, New York's moratorium is more narrowly tailored than that of *Florida Bar* insofar as it incorporates the Task Force Report's fifteen-day black-out period, which shortens the moratorium period to fifteen days where an attorney or law firm must make a filing within thirty days of an incident as a legal prerequisite to a particular claim. N.Y. Comp. Codes R. & Regs., tit. 22, §§ 1200.52(e), 1200.36(a), 1200.36(b). No doubt the statute could have been more precisely drawn, but it need not be "perfect" or "the least restrictive means" to pass constitutional muster. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989).

New York's moratorium provisions prohibit targeted communications by lawyers to victims, their families, or their representatives as to a specific personal injury or wrongful death event, where such communications occur within thirty days of the incident in question. Where a legal filing is required within thirty days, the moratorium is limited to fifteen days. These provisions, although they reach a broader range of advertisements than those proscribed by the moratorium in *Florida Bar*, do not impose barriers inconsistent with the First Amendment. We conclude that the moratorium provisions, as construed, are sufficiently narrowly tailored to survive constitutional scrutiny.

Appendix A

CONCLUSION

The thorough and well-reasoned opinion of the District Court is AFFIRMED, except as to N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.50(c)(3)'s ban on "the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply[ing] that lawyers are associated in a law firm if that is not the case." With respect to this portion of § 1200.50(c)(3) only, the judgment of the District Court is REVERSED.

APPENDIX B — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED JULY 20, 2007 AND FILED JULY 23, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

5:07-CV-117 (FJS/GHL)

JAMES L. ALEXANDER;
ALEXANDER & CATALANO LLC;
and PUBLIC CITIZEN, INC.,

Plaintiffs,

v.

THOMAS J. CAHILL, in his official capacity as Chief Counsel for the Departmental Disciplinary Committee for the Appellate Division of the New York State Court of Appeals, First Department; DIANA MAXFIELD KEARSE, in her official capacity as Chief Counsel for the Second and Eleventh Judicial District Grievance Committee; GARY L. CASELLA, in his official capacity as Chief Counsel for the Ninth Judicial District Grievance Committee; RITA E. ADLER, in her official capacity as Chief Counsel for the Tenth Judicial District Grievance Committee; MARK S. OCHS, in his official capacity as Chief Attorney for the Committee on Professional Standards for the Appellate Division of the New York Court of Appeals, Third Department; ANTHONY J.

Appendix B

GIGLIOTTI, in his official capacity as acting Chief Counsel for the Fifth Judicial District Grievance Committee; DANIEL A. DRAKE, in his official capacity as acting Chief Counsel for the Seventh Judicial District Grievance Committee; and VINCENT L. SCARSELLA, in his official capacity as acting Chief Counsel for the Eighth Judicial District Grievance Committee,

Defendants.

SCULLIN, Senior Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiffs filed their Complaint on February 1, 2007, seeking a declaratory judgment that certain provisions of New York's amended rules on attorney advertising violate the First Amendment and requesting a permanent injunction prohibiting Defendants from enforcing those amendments. On February 14, 2007, Plaintiffs moved for a preliminary injunction. In response, on March 27, 2007, Defendants filed their cross-motion to dismiss Plaintiffs' claims asserting three arguments: (1) that Defendants have no independent disciplinary authority and, therefore, are not proper parties to this action; (2) that Plaintiff Public Citizen lacks standing to sue on behalf of its members; and

(3) that *Burford* abstention is warranted.[1] On April 13, 2007, the Court heard oral argument on Plaintiffs' motion for a preliminary injunction and Defendants' cross-motion to dismiss Plaintiffs' claims. At that time, the Court denied Defendants' cross-motion to dismiss Plaintiffs' claims, finding that Defendants are proper parties, that Plaintiffs have standing, and that abstention is not warranted. In addition, the Court reserved its decision on Plaintiffs' motion for a preliminary injunction and ordered an expedited trial on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. Thereafter, the parties agreed to stipulate to the material facts as well as the authenticity of several exhibits. In view of these stipulations, the parties further agreed to resolve their differences by way of summary judgment. Both parties filed motions for summary judgment, and the Court heard oral argument concerning these motions on June 18, 2007. The following constitutes the Court's written determination of these motions.

II. BACKGROUND

Plaintiff James L. Alexander is a New York-licensed attorney and managing partner of Plaintiff Alexander

1. The *Burford* abstention doctrine applies when a case presents complex questions of state law that transcend the immediate case such that federal review would disrupt state efforts to establish a coherent policy on a matter of public concern. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814-15, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) (citations omitted).

& Catalano LLC, which has offices in Syracuse and Rochester. Alexander & Catalano advertises its legal services through broadcast media, print advertisements, and other forms of public media. Prior to February 1, 2007, Alexander & Catalano's commercials often contained jingles and special effects, including wisps of smoke and blue electrical currents surrounding the firm's name. A number of the firm's commercials also contained fictional or comical scenes.

Plaintiff Alexander & Catalano believes that some of its previously-used advertising techniques may violate the amended rules. Since February 1, 2007, it has stopped running many of its advertisements and has altered other advertisements in an effort to assure that it was in compliance with the amended rules. Notably, it has stopped using its slogan "the heavy hitters." Additionally, the firm has stopped running advertisements portraying its attorneys as giants towering over downtown buildings, depicting its attorneys counseling space aliens concerning an insurance dispute, and representing its attorneys running as fast as blurs to reach a client in distress.

Plaintiff Public Citizen, Inc. is a national non-profit corporation with approximately 100,000 members. Approximately 9,450 members reside in New York, and the members are consumers of legal services. A division of Public Citizen, referred to as the Public Citizen Litigation Group ("PCLG"), employs eight attorneys, two of whom are licensed in New York. PCLG has litigated public interest cases in a variety of contexts,

including the First Amendment, consumer rights, and federal health and safety regulations. Plaintiff Public Citizen maintains that, although it is a non-profit organization, the amendments purport to restrict its speech as well.

New York Judiciary Law § 90(2) authorizes the Appellate Division of the New York State Supreme Court to discipline attorneys for professional misconduct. *See* N.Y. Jud. Law § 90(2) (McKinney 2002). Pursuant to this authority, the four presiding justices from each of New York's four departments are responsible for adopting the Disciplinary Rules of the Code of Professional Responsibility (known as joint rules of the Appellate Division). These rules set the parameters for professional conduct and provide for the discipline of attorneys who violate the rules. The Appellate Division justices have appointed disciplinary committees for each department (and several departments have subdivided to allow district disciplinary committees to handle attorney disciplinary matters in smaller geographic areas).

Defendants are the Chief Counsels or Acting Chief Counsels of various departmental or district disciplinary committees. In their official roles, they are collectively charged with initiating investigations into complaints concerning attorney misbehavior. After an investigation, and in consultation with the relevant disciplinary committee, Defendants are empowered to take a number of actions including, but not limited to, dismissing the complaint, referring the complaint for mediation or

monitoring, issuing a letter of caution, or recommending that formal disciplinary proceedings commence. If formal disciplinary proceedings are warranted, Defendants commence these proceedings in the Appellate Division.[2]

In June 2006, the four presiding justices approved several proposed amendments to the existing disciplinary rules governing attorney advertising. The presiding justices submitted the amendments for public comment and received comments from Defendant Public Citizen and the Federal Trade Commission. On January 4, 2007, after further revision, the presiding justices adopted the final version of the amendments, which took effect on February 1, 2007.

The amendments effect a number of significant changes to the State's previous rules on law firm advertising.[3] For the purposes of this motion, the Court

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2. Discipline may include censure, suspension, or disbarment.

3. In general, the rules provide broad definitions of what is covered in the terms "law firm" or "advertisement:"

N.Y. Comp. Codes R. & Regs tit. 22, § 1200.1

> (b) Law firm includes, but is not limited to, a professional legal corporation, a limited liability company or partnership engaged in the practice of law, the legal department of a corporation or other organization and a qualified legal assistance organization.
>
> * * *

(Cont'd)

has classified the amendments at issue into three groups. The first group of amendments addresses restrictions on potentially misleading advertisements and consists of several rules:

N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.6:

> (c) An advertisement shall not:
>
> (1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending;
>
> * * *
>
> (3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;
>
> * * *

(Cont'd)

> (k) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence;

* * *

(7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

* * *

(g) A lawyer or law firm shall not utilize:

(1) a pop-up or pop-under advertisement in connection with computer-accessed communications, other than on the lawyer or law firm's own web site or other internet presence . . . .

N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.7:

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate a disciplinary rule.

The second group of amendments addresses restrictions that impose a thirty-day moratorium on certain communications following a personal injury or wrongful death event:

N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.8:

(b) For purposes of this section "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

* * *

(g) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

N.Y. Comp. Codes R. & Regs. tit. 22, §§ 1200.41-a:

(a) In the event of an incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm, seeking to represent the injured individual or legal representative thereof in potential litigation or in a proceeding arising out of the incident before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

Appendix B

The third group of amendments addresses the alleged application of the rules to nonprofit legal organizations that do not charge clients. This category includes the above amendments, as well as document-retention and advertising-label requirements:

N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.6:

> (f) Every advertisement other than those appearing in a radio or television advertisement or in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to section 1200.8(a)(1) of this Part, shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."
>
> * * *
>
> (k) All advertisements shall be pre-approved by the lawyer or law firm and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this

section shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

III. DISCUSSION

At oral argument, the Court answered the threshold question as to whether the First Amendment protects the speech that the State seeks to regulate in the affirmative.[4]

It is well-established that attorney advertising is commercial speech that enjoys some First Amendment protection. *See Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 623, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (citations omitted). Moreover, there is a long line of cases

4. At the first oral argument on April 13, 2007, the Court instructed the parties to apply the test in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), to the challenged amendments. However, despite the Court's directive, Defendants continued to assert that the State of New York could ban attorney advertising that was "irrelevant, unverifiable, [and] non-informational" without reference to the *Central Hudson* test. *See* Defendants' Memorandum of Law at 4. Defendants have provided no legal support for this proposition, and the Court finds none. Although these characteristics may be evidence that an advertisement is misleading, they do not by themselves constitute a justification for banning commercial speech in the form of attorney advertising.

applying the *Central Hudson* test to attorney-advertising rules. *See, e.g.*, *Chambers v. Stengel*, 256 F.3d 397, 403-05 (6th Cir. 2001) (involving Kentucky's 30-day moratorium on contacting victims); *Mason v. Fla. Bar*, 208 F.3d 952, 955-58 (11th Cir. 2000) (involving Florida's rule prohibiting "self-laudatory advertisements"); *Falanga v. State Bar of Ga.*, 150 F.3d 1333 (11th Cir. 1998) (involving Georgia's rule on in-person solicitations). In addition, the Second Circuit has stated generally that "minimal information, conveyed in the context of a proposal of a commercial transaction, suffices to invoke the protections for commercial speech, articulated in *Central Hudson*." *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 97 (2d Cir. 1998) (footnote omitted). Accordingly, the Court will analyze the State's amended rules pursuant to the test in *Central Hudson*.

Under the *Central Hudson* test, Defendants must (1) assert that there is a substantial State interest to be achieved by the restriction; (2) demonstrate that the restriction materially advances the state interest; and (3) establish that the restriction is narrowly drawn. *See Central Hudson*, 447 U.S. at 564-66. "This burden is not satisfied by mere speculation or conjecture; rather, [the defendant] . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) (citations omitted). Some form of empirical or

anecdotal evidence is usually required.[5] *See Went for It*, 515 U.S. at 626; *Capobianco v. Summers*, 377 F.3d 559, 562 (6th Cir. 2004) (citation omitted) (finding adequate the State of Tennessee's presentation of newspaper articles documenting solicitation problems related to chiropractors, declarations of solicited individuals, and articles from scientific and business publications).

As stated above, the Court has divided the challenged amendments into three groups, which it will address *seriatim*, applying the legal standard set forth in *Central Hudson*.

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5. Defendants assert that they are entitled to rely on common sense, history, and consensus alone to support the State's restrictions in the absence of other evidence. However, the Court notes that this "evidence" alone has not sufficed in attorney-advertising cases. In *Went for It*, the State of Florida presented a two-year study of attorney advertising containing statistical evidence from a consumer survey and anecdotal evidence in the form of newspaper editorials and consumer complaints. *See* 515 U.S. at 626-27. Moreover, precedent from other circuits shows that the proponent of a restriction must present some actual evidence beyond the unsupported assertion that the state relied on common sense, history, or consensus. *See, e.g.*, *Chambers*, 256 F.3d at 404 (finding adequate the defendants' submission of the study from *Went for It*, the affidavit of a state legislator who had a personal experience with attorney solicitation following an accident, the affidavit of a state bar official summarizing a public survey, and articles and letters from a local newspaper and state bar journal); *Mason*, 208 F.3d at 957. *But see Falanga*, 150 F.3d at 1341.

Appendix B

A. Amendments That Concern Potentially Misleading Advertisements

1. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.6(c)

As noted above, amendments to § 1200.6(c) prohibit attorney advertisements from containing endorsements and testimonials about matters still pending, portrayals of judges, techniques to obtain attention that lack relevance to selecting counsel, portrayals of attorneys with characteristics unrelated to legal competence, and use of a nickname, moniker, motto, or trade name that implies an ability to obtain results in a matter.

a. Does the State have a substantial interest?

Defendants assert that "[t]he State has a substantial interest in encouraging the clean flow of truthful, helpful, relevant, verifiable information about attorney services and, conversely, restricting the introduction of non-truthful, unhelpful, irrelevant material." *See* Defendants' Memorandum of Law at 14 (citations omitted). In addition, Defendants contend that the State has an interest in maintaining attorney professionalism and respect for the bar. *See id.* In response, Plaintiffs assert that the restrictions are impermissibly based on the State's desire to prohibit attorney advertisements that it finds offensive or distasteful. *See* Plaintiffs' Memorandum of Law at 6.

Defendants' essential argument that the State has a substantial interest in protecting consumers from

misleading attorney advertisements is well-supported. *See, e.g., Mason*, 208 F.3d at 956 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978)). Moreover, the parties submitted a New York State Bar Association Task Force Report, dated October 21, 2005, indicating that the State genuinely held this asserted interest:

> The Committee identified a number of key issues and problems that exist under the current attorney advertising regime. These include: [f]alse, deceptive or misleading advertisements, in print, broadcast, and on-line advertisements . . . .
>
> * * *
>
> [A]lthough a very small minority of advertisements could be categorized as false or deceptive on their face, about a third of them . . . were found to be deceptive.

See Joint Stipulation at Exhibit 3 at 5, 26-27, 47. Accordingly, the Court finds that Defendants have established that the State has a substantial interest to ensure that attorney advertisements are not misleading and, therefore, have satisfied the first *Central Hudson* prong with respect to § 1200.6(c).[6]

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6. The State's secondary interest in maintaining attorney professionalism and respect for members of the bar also appears

(Cont'd)

b. Do the amendments materially advance the State's interest?

In support of this prong of the *Central Hudson* test, Defendants submitted two short press releases which merely summarize the new restrictions, a DVD recording of a Monroe County Bar Association forum considering the scope of the amendments on August 17, 2006, at which former Presiding Justice Eugene F. Pigott was a panelist, and the New York State Bar Association Task Force Report.[7] Defendants did not submit any statistical or anecdotal evidence of consumer problems with or complaints about misleading attorney advertising. Nor did they specifically identify any studies from other

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(Cont'd)

to be substantial. The Supreme Court has noted that "'[s]tates have a compelling interest in the practice of professions within their boundaries, and . . . they have broad power to establish standards for licensing practitioners and regulating the practice of professions.'" *Went for It*, 515 U.S. at 625 (quotation and other citations omitted).

7. The Task Force Report is a comprehensive document, which reviews the state of the law on attorney advertising in both its local and constitutional dimensions. In addition, it summarizes the Task Force's empirical research, which primarily consisted of reviewing a sample of actual New York attorney advertisements, as well as position papers, cases, and articles. Finally, the Task Force Report states that the Task Force conducted a fifty-state review of attorney-advertising regimes. *See* Joint Stipulation at Exhibit 3 at 6-7, 55.

jurisdictions on which the State relied in implementing the amendments. Compared to the evidence presented in *Went for It*, *Chambers*, and *Falanga*, the record as to this issue in this case is notably lacking.

Notwithstanding, the Court finds that the Task Force Report, by itself, is sufficient to support a finding that the State's interests are materially advanced with respect to two amendments: § 1200.6(c)(3) (prohibition on the portrayal of judges in attorney advertisements) and § 1200.6(c)(7) (prohibition on the use of trade names that imply an ability to obtain results).

Task Force Report regarding judges

> The following, if used in public communications or communications to a prospective client, are likely to be false, deceptive or misleading: . . . a communication that states or implies that the lawyer has the ability to influence improperly a court, court officer, governmental agency or government official . . . .
>
> * * *

Task Force Report regarding trade names

> The Committee endorsed COSAC's continuation of the ban on use of trade names, which is also in the current DR's, believing that trade names

> are far too likely to be false, deceptive and misleading to consumers of legal services.[8]

See id. Tab 1 at 11; *id.* at 65. Accordingly, the Court finds that Defendants have satisfied the second *Central Hudson* prong with respect to these specific amendments.

However, Defendants have not shown how the remaining amendments of § 1200.6(c) materially advance the State's interests. The Task Force Report, rather than providing support for their adoption, recommended a different approach. For instance, the Task Force recommended imposing new disclosure and review requirements along with bolstering enforcement of the existing rules instead of imposing new content-based restrictions. *See* Joint Stipulation at Exhibit 3 at 58 ("The Committee agrees that the content [of attorney advertising] should not be regulated."); *see also id.* at Tab 1 at 2.

Moreover, the Task Force recommended adopting guidelines such as those that the Monroe County Bar Association issued, which would seem contrary to much of § 1200.6(c) in that they permit dramatizations,

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8. COSAC refers to the Committee on Standards of Attorney Conduct, a state bar committee formed in January 2003 to evaluate the revised Model Rules of Professional Conduct. The Task Force Report frequently references this Committee's conclusions. Aside from these references, Defendants did not submit the COSAC report for the Court's consideration.

pictures, and stylistic elements that might be prohibited under § 1200.6(c)(5).[9] In contrast to the amended rules, the Monroe County Bar Association guidelines contemplate such advertising techniques while providing guidance as to their proper use rather than seeking their wholesale prohibition. The relevant sections of the Monroe County Bar Association guidelines provide as follows:

> Advertising that recreates, dramatizes or simulates situations or persons should fairly represent the underlying facts and properly disclose that they have been staged.
>
> * * *
>
> Pictures and other stylistic elements should be used to reinforce traditional considerations, and should not unduly frighten, inflame or otherwise manipulate viewers into ignoring rational considerations. Lawyer advertising should not be likely to shock or offend a substantial segment of the community or to foster disrespect for the law, the legal profession or the judicial system.

See id. at Exhibit 3 at 70-71.

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9. As noted above, this amendment prohibits the use of attention-drawing advertising techniques that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence.

Since Defendants have submitted no other evidence to support this requirement, the Court finds that Defendants have not satisfied their burden on the second *Central Hudson* prong, and, therefore, it **GRANTS** Plaintiffs' and **DENIES** Defendants' motion for summary judgment on Plaintiffs' claims concerning the following amendments:

- § 1200.6(c)(1) prohibiting endorsements and testimonials from a client about a pending matter;

- the portions of § 1200.6(c)(3) prohibiting the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated in a firm, or otherwise implying that lawyers are associated in a firm if that is not the case;

- § 1200.6(c)(5) prohibiting the use of techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence; and

- the portions of § 1200.6(c)(7) prohibiting the use of a nickname, moniker, or motto that implies an ability to obtain results.

c. Are §§ 1200.6(c)(3) and (c)(7) narrowly tailored?

As noted above, the Court finds that Defendants have adequately justified § 1200.6(c)(3), concerning the portrayal of judges, and § 1200.6(c)(7), concerning the use of trade names that imply an ability to obtain results, under the second *Central Hudson* prong.

Under the third *Central Hudson* prong, a restriction is not narrowly drawn if it is "'"broader than reasonably necessary to prevent the" perceived evil.'" *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 107, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990) (quotation, other citation, and footnote omitted). Therefore, recognizing the value of the free flow of commercial information, the Supreme Court has stated that a state may not impose a prophylactic ban on potentially misleading speech merely to spare itself the trouble of "distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985).

In *Zauderer*, the Supreme Court held that a state may not categorically ban illustrations in attorney advertisements. *See id.* at 649. Although the Court recognized the convenience of a blanket ban, it concluded that, due to the possibility of case-by-case enforcement, a prophylactic rule was impermissible. *See id.*; *see also Peel*, 496 U.S. at 110 (noting the

possibility of requiring a disclaimer in a case involving advertising an attorney's certification as a trial specialist). Finally, in both *Zauderer* and *Peel*, the Court required the proponent of the restriction to make a showing of the need for a blanket ban rather than less restrictive means. *See Peel*, 496 U.S. at 109 (employing a "presumption that members of a respected profession are unlikely to engage in practices that deceive their clients and potential clients" and noting that the mere potential for misleading in an attorney's communications "does not satisfy the State's heavy burden of justifying a categorical prohibition . . . ." (citations omitted)); *Zauderer*, 471 U.S. at 648 (noting that the state offered only unsupported assertions without "evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban").

As written, that portion of § 1200.6(c)(3) that prohibits the portrayal of judges and that portion of § 1200.6(c)(7) that prohibits the use of trade names that imply an ability to obtain results are categorical bans. Defendants have failed to produce any evidence that measures short of categorical bans would not have sufficed to remedy the perceived risks of such advertising being misleading. There is nothing in the record to suggest that a disclaimer would have been ineffective. For portrayals of judges, the State could have required a disclaimer similar to that required for a fictional scene, which is found in § 1200.6(c)(4). For trade names implying an ability to obtain results, there

is no evidence that the existing disclaimer that "[p]rior results do not guarantee a similar outcome" in § 1200.6(e) or some other similar disclaimer would have been ineffective.[10] Finally, and very importantly, Defendants have not given the Court any reason to believe that better enforcement of the then-existing rules on a case-by-case basis, as the Task Force Report recommended, would not accomplish the desired results.[11] Accordingly, the Court finds that Defendants have not established that these amendments are narrowly tailored. Therefore, the Court **GRANTS** Plaintiffs' and **DENIES** Defendants' motion for summary judgment on Plaintiffs' claims concerning §§ 1200.6(c)(3) and (7).

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10. The Court notes that an existing provision labeled "Professional Notices, Letterheads, and Signs" already prohibits practicing under a trade name:

> (b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm . . . .

N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.7(b). The parties did not address this provision in their arguments.

11. As previously stated, the Task Force Report counseled against additional content restrictions and recommended closer review and more effective enforcement of the then-existing rules.

2. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.6(g)(1)

As noted above, § 1200.6(g)(1) prohibits pop-up and pop-under advertisements on websites other than those that the attorney or law firm owns. The Court need only consider this amendment briefly since Defendants do not discuss this restriction in their summary judgment papers and only argued at oral argument that a categorical ban on pop-up and pop-under advertisements was necessary because their fleeting nature is such that the State could not enforce lesser restrictions.[12] The Court rejects this argument as contrary to common sense: there is no evidence that the regulation, observation, or retention of pop-up and pop-under advertisements is any more difficult than the regulation, observation, or retention of advertisements

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12. In their summary judgment papers, Defendants assert that Plaintiffs only challenge this amendment as it relates to Plaintiff Public Citizen and non-commercial speech. In addition, Defendants assert that this amendment does not apply to non-commercial speech. Therefore, Defendants mention the ban on pop-up and pop-under advertisements only in a footnote and only to state that "no particular discussion of these regulations is required." *See* Defendants' Memorandum of Law at 22 n.21.

Contrary to Defendants' assertions, Plaintiffs' Complaint and Notice of Motion indicate that they seek to generally enjoin enforcement of the amendment against commercial and noncommercial speech. *See* Complaint at 15; Notice of Motion. Moreover, and paradoxically, Defendants conceded at oral argument that, based on the broad definition of "advertisement," this amendment applies to non-commercial speech.

on television, radio, or websites. Furthermore, Defendants' argument relates only to the third *Central Hudson* prong, and there is no evidence currently before the Court to meet Defendants' burden on the first two *Central Hudson* prongs. Accordingly, based on the limited evidence that Defendants presented, the Court **GRANTS** Plaintiffs' and **DENIES** Defendants' motion for summary judgment on Plaintiffs' claims concerning § 1200.6(g)(1).[13]

3. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.7(e)

As noted above, § 1200.7(e) contains restrictions on attorney and law firm domain names and websites.

a. Does the State have a substantial interest?

Defendants rely on the same interests noted above: the state's interest to encourage truthful attorney advertising and to avoid deceptive attorney advertising as well as its interest to maintain attorney

13. Even if Defendants had satisfied the first two *Central Hudson* prongs, the Court notes that the pop-up and pop-under ban would not be narrowly drawn because it would go beyond regulating potentially misleading advertisements to prohibit bland, entirely truthful advertisements. *See generally Shapero v Kentucky Bar Ass'n*, 486 U.S. 466, 479, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988) (striking Kentucky's ban on direct-mail solicitation and stating that "so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and non-deceptive lawyer solicitations to those least likely to be read by the recipient.").

professionalism and public respect for the bar. As noted above, these asserted interests satisfy the first *Central Hudson* prong.

b. Does the amendment materially advance the State's interest?

The Task Force Report contained an extensive discussion of the need for regulation of attorney advertising on the internet, including the following consideration of domain names:

> Certain website URLs are unprofessional and distasteful, (e.g. "Vioxxattorney.com"), but taste is not perceived as a problem that can be regulated except to the extent that such a domain name violates the New York disciplinary rule against the use of trade names and should be prevented. See DR 2-102(B). The only practical means of finding such advertising, especially on the worldwide web, is to require filing and auditing.

See Joint Stipulation at Exhibit 3 at 53. In addition, the Task Force noted a problem with advertisements in general, noting that approximately one-third were deceptive and that more than half failed to include the firm's name, address, or telephone number. *See id.* at 47-48. Specifically concerning websites, the Task Force concluded that "readily identifiable issues with on-line attorney advertising and websites include the failure of a web page or advertisement to state the name, address,

and telephone number of the law firm." *See id.* at 52. Moreover, it stated that an attorney or firm's failure to include its location on a website may be deceptive because the public would not know how local the firm is; therefore, the Task Force recommended requiring inclusion of the attorney or firm name, its telephone number, and the addresses of all offices within New York on the homepage. *See id.* The Court finds that this evidence is sufficient to satisfy the second *Central Hudson* prong by demonstrating that the State's restrictions on domain names may be appropriate to avoid deceptive attorney advertisements.

c. Is the amendment narrowly tailored?

The adopted restriction on domain names closely conforms to the Task Force's recommendation. In fact, the Court finds that the amendment is narrower than the one that the Task Force proposed because it does not apply to all websites but only to those which have domain names that do not include the name of the lawyer or law firm. Therefore, § 1200.7(e) would not apply to a website such as www.alexanderandcatalano.com or www.publiccitizen.com. Moreover, on its face, this amendment does not appear to be an onerous restriction — an attorney can use any domain name as long as (1) all pages of the website contain his name; (2) he does not practice law using the domain name;[14] (3) the domain

14. Although Plaintiffs asserted at oral argument that this second requirement makes the amendment overly broad, the Court construes this provision as parallel to the existing rule in

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name does not imply an ability to obtain results; and (4) the domain name does not violate another disciplinary rule. The Court finds that this amendment is narrowly tailored and that Defendants have satisfied the third *Central Hudson* prong. Accordingly, it **DENIES** Plaintiffs' and **GRANTS** Defendants' motion for summary judgment on Plaintiffs' claim concerning this amendment.

B. Thirty-day Moratorium on Contacting Victims

As noted above, §§ 1200.8(g) and 1200.41A contain a thirty-day moratorium on communications to victims, their families, or their representatives relating to a specific personal injury or wrongful death event. In cases where a legal filing is required within thirty days, the moratorium is limited to a fifteen-day cooling off period.

Based on the language of these two provisions, New York's moratorium is broader than Florida's thirty-day moratorium in *Went for It*, which restricted only direct-mail solicitations. *See* 515 U.S. at 620-21. The moratorium provisions in this case extend by their plain language to television, radio, newspaper, and website solicitations

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§ 1200.7(b), which prohibits practicing under a trade name. Therefore, it does not appear to add any meaningful new restriction. In other words, just as attorneys could not practice under a trade name, they cannot practice under a domain name that does not contain the name of an attorney.

that are directed to or targeted at a specific recipient or group of recipients.[15]

1. Does the State have a substantial interest?

The State has substantial interests in protecting the privacy of its citizens and guarding against the indignity and offense of being solicited for legal services immediately following a personal injury or wrongful

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15. The moratorium provision in § 1200.8(g) applies to "solicitation[s]," which are defined as "any advertisement[s] initiated by or on behalf of a lawyer or law firm that [are] directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. . . ." N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.8(b). By its terms, this provision applies to any advertisement that is targeted at a specific recipient or group of recipients regardless of medium. For instance, an advertisement in a newspaper during the moratorium period following an airplane crash would be prohibited if it targeted a specific group of recipients: *i.e.*, "Attention Flight # 999 Survivors, call Smith Law Firm to protect your rights."

The moratorium provision in § 1200.41A is similarly broad, encompassing any "unsolicited communication . . . made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm . . . seeking to represent the injured individual . . . in potential litigation . . . ." N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.41A. The term "communication" is not limited to any medium. Therefore, the unlimited term "communication" also encompasses media other than direct-mail.

death event. *See Went for It*, 515 U.S. at 625. Moreover, the Task Force Report supports the conclusion that the State actually relied on these substantial interests in formulating its regulations. *See* Joint Stipulation at Exhibit 3 at 61-63 ("[T]he Committee believed the cooling off requirement would be beneficial in removing a source of annoyance and offense to those already troubled by an accident or similar occurrence, and would not preclude victims from seeking legal advice on their own initiative."). In reaching its conclusions, the Task Force considered moratoriums in Florida and eight other states, as well as the federal moratorium for aviation disasters. *See id.* at 61. Accordingly, Defendants have satisfied the first *Central Hudson* prong concerning the moratorium.

2. ***Do the amendments materially advance the State's interests, and, if so, are they narrowly tailored?***

Defendants cite the Task Force Report for the proposition that this moratorium materially advances the State's interests and, in their briefs, assert that a developing history, an emerging consensus among the states, and common sense support New York's broader moratorium.

The Task Force reviewed direct-mail moratoriums in Florida and eight other states. The Task Force also considered the federal airline disaster moratorium, which is not limited to direct-mail solicitations but prohibits "unsolicited communications" generally within

forty-five days of an airline disaster. *See* Joint Stip at Ex. 3 at 61-63 (quoting 49 U.S.C. § 1136(g)(2)). Ultimately, the Task Force recommended a fifteen-day "cooling off requirement . . . [as] beneficial in removing a source of annoyance and offense to those already troubled by an accident or similar occurrence." *See id.*

Plaintiffs note two potential infirmities in the adopted moratorium. First, although the Task Force Report recommended a fifteen-day moratorium, the State adopted a thirty-day moratorium. Second, Plaintiffs complain that the adopted moratorium covers a wide variety of media rather than merely the direct-mail solicitations that Florida banned in *Went for It.*

Although the thirty-day moratorium is more restrictive, First Amendment jurisprudence does not require that the State adopt the precise restriction that its expert panel recommends. First Amendment jurisprudence only requires that the restriction must be proportionate to the State's interest. *See Went for It*, 515 U.S. at 632 (quotation omitted); *Hayes v. Zakia*, No. 01-CV-0907E, 2002 U.S. Dist. LEXIS 18587, 2002 WL 31207463, *6 n.16 (W.D.N.Y. Sept. 17, 2002) (quotation omitted).

Furthermore, it is clear from the Task Force Report that there is an emerging consensus among authorities, state and federal, regarding the desirability of some form of moratorium. In reviewing the justification for Florida's thirty-day moratorium and considering the Supreme Court's rationale in *Went for It* (both of which

the Task Force Report cited), the State had ample basis from which it could conclude that a thirty-day moratorium would better advance its interests. Moreover, the Court notes the existence of "ample alternative channels" for the public to receive information concerning legal services during the moratorium period — namely, general advertisements in any media, provided they do not reference a specific tragedy. *Went for It*, 515 U.S. at 633-34. Even casual observation of television, radio, and print advertisements since February 1, 2007, indicates that New York law firms have had little difficulty advertising their services and explaining their expertise to consumers without running afoul of the moratorium.[16]

With respect to the breadth of the moratorium, the Court likewise finds this provision to be reasonable insofar as it relates to a specific event. The federal airline moratorium that the Task Force considered is not limited to any specific medium. Furthermore, the Court credits the common sense notion that a solicitation concerning a specific personal injury or wrongful death event is no less disturbing when it enters a victim or family member's home through the newspaper, the internet, or the airwaves rather than through the mail. *Cf. id.* at 631 ("[T]he harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a

16. The fact that Congress adopted a forty-five day moratorium following airline disasters further supports the fact that a thirty-day moratorium is not an unreasonable length of time.

function of the letters' contents."). Moreover, the State's interest in preventing its citizens from being offended is not necessarily limited to their personal offense in the abstract: it may also extend to the detrimental effects of such offense on the legal profession. *See id.* Therefore, the Court finds that Defendants have satisfied the second and third *Central Hudson* prongs because the moratorium materially advances the State's interests and the amendments are narrowly tailored to those interests.

Accordingly, the Court **DENIES** Plaintiffs' and **GRANTS** Defendants' motion for summary judgment on Plaintiffs' claims concerning §§ 1200.8(g) and 1200.41A.

C. The Amendments' Application to Non-commercial Communications

Plaintiffs assert that the amendments and their broad definition of the term "advertisement" apply to non-profit legal organizations that do not charge clients. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 22, §§ 1200.6(f), (k). Therefore, Plaintiffs assert that the amendments are subject to strict scrutiny pursuant to *In re Primus*, 436 U.S. 412, 428, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978), because they apply with full force to *pro bono* organizations that use litigation as a means of political expression and association.[17]

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17. In *In re Primus*, the Supreme Court evaluated South Carolina's solicitation rule as applied to the American Civil

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In response, Defendants assert that the Court should narrowly construe the amendments to avoid declaring them unconstitutional pursuant to *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 176-77 (2d Cir. 2006). Therefore, Defendants argue that the Court could reasonably construe the definition of "advertisement" to exclude non-commercial communications. Moreover, Defendants make an argument related to legislative intent, stating that "the Presiding Justices were undoubtedly cognizant of the relevant distinctions between commercial and noncommercial speech and the holding of In re Primus . . . ." *See* Defendants' Memorandum of Law at 23-24. Finally, Defendants contend that the Court should presume that the Presiding Justices will constitutionally enforce the amendments. *See* Defendants' Reply at 7 (citing *Wilson v. De Bruyn*, 633 F. Supp. 1222, 1225-26 (W.D.N.Y. 1986)).

The Second Circuit has stated that courts should take a "holistic" approach to construing statutes. *Field Day*, 463 F.3d at 177. Thus, the courts should "'presume any narrowing construction or practice to which the law

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Liberties Union ("ACLU"). The Court noted that, although providing legal services is a primary purpose of the ACLU, the organization used litigation as a form of political expression and political association. *See In re Primus*, 436 U.S. at 427-28. Therefore, it determined that "exacting scrutiny" applied: the state must demonstrate a compelling interest and means that are "'closely drawn to avoid unnecessary abridgment of associational freedoms.'" *Id.* at 432 (quotation omitted).

is fairly susceptible.'" *Id.* (quotation omitted). Moreover, the court must consider the law's background:

> In interpreting statutes, this Court reads statutory language in light of the surrounding language and framework of the statute. . . . "'[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems,' we may 'construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the Legislature].'"

Id. (quotation and internal citation omitted).

With the exception of § 1200.8, which applies to solicitations motivated by pecuniary gain, the amendments apply to "advertisements" generally and do not explicitly reference whether or not non-commercial communications are included within their scope. However, there is evidence of the presiding justices' intent before the Court. Defendants provided a DVD recording of former Presiding Justice Pigott's comments at a Monroe County Bar Association forum on August 17, 2006, concerning the scope of the then-proposed amendments. At that time, former Presiding Justice Pigott clearly indicated that presiding justices intended to focus the amendments on attorneys motivated by profit, and, therefore, inclined to "overreach." *See* Defendants' DVD Exhibit. Furthermore, Defendants conceded at oral argument that the amendments could not constitutionally limit non-commercial attorney communications motivated by

an organization's interest in political expression and association.[18]

In light of this evidence, and pursuant to *Field Day*, the Court adopts a limited construction of the amendments vis-a-vis their application to non-commercial advertising. Accordingly, the Court **DENIES** Plaintiffs' and **GRANTS** Defendants' motion for summary judgment on Plaintiffs' claims concerning application of the amendments to non-commercial speech.[19]

18. The Court also notes the absence of state interpretation concerning the scope of the challenged amendments. *See Field Day*, 463 F.3d at 177 ("In the absence of state interpretation, federal courts 'will presume any narrowing construction or practice to which the law is fairly susceptible.'" (footnote and quotation omitted)).

19. Plaintiffs also assert that two amendments are unconstitutionally vague — N.Y. Comp. Codes R. & Regs. tit. 22, §§ 1200.6(c)(5) and (c)(7). However, since the Court has determined that the amendments do not apply to non-commercial advertisements, it need not address Plaintiffs' vagueness challenge.

IV. CONCLUSION[20]

Accordingly, having reviewed the parties' submissions and heard their arguments in support of, and in opposition to, the current motions, and for the reasons stated in this Order, as well as at oral argument, the Court hereby

ORDERS that Plaintiffs' motion for summary judgment is **GRANTED** and Defendants' motion for summary judgment is **DENIED** on Plaintiffs' claims concerning N.Y. Comp. Codes R. & Regs. tit. 22, §§ 1200.6(c)(1), (3), (5), (7), and (g)(1); and the Court further

ORDERS that Plaintiffs' motion for summary judgment is **DENIED** and Defendants' motion for

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20. In sum, the Court notes that it is altogether appropriate for the Appellate Division of the State of New York, having been charged by law with the responsibility of overseeing the professional conduct of attorneys admitted to practice before the courts of New York, to be concerned with the issue of attorney advertising. Without question there has been a proliferation of tasteless, and at times obnoxious, methods of attorney advertising in recent years. New technology and an increase in the types of media available for advertising have exacerbated this problem and made it more ubiquitous. As a result, among other things, the public perception of the legal profession has been greatly diminished. Although the Court finds it commendable that the Appellate Division of the State of New York and the disciplinary committees that function on its behalf pursue ways to regulate the manner and means by which attorneys who choose to advertise may do so, they must be mindful of the protections such advertising has been afforded and take the necessary steps to see that the regulation of such advertising is accomplished in a manner consistent with established First Amendment jurisprudence.

summary judgment is **GRANTED** on Plaintiffs' claims concerning N.Y. Comp. Codes R. & Regs. tit. 22, §§ 1200.7(e), 1200.8(g), and 1200.41-a and Plaintiffs' claims concerning the amended rules' applicability to non-commercial communications; and the Court further

ORDERS that Plaintiffs' request for a declaration that N.Y. Comp. Codes R. & Regs. tit. 22, §§ 1200.6(c)(1), (3), (5), (7), and (g)(1) are unconstitutional based on the current record is **GRANTED;** and the Court further

ORDERS that Plaintiffs' request for a permanent injunction is **GRANTED** according to the following terms:

Defendants are hereby enjoined from enforcing amendments to the Disciplinary Rules of the Code of Professional Responsibility contained in N.Y. Comp. Codes R. & Regs. tit. 22, §§ 1200.6(c)(1), (3), (5), (7), and (g)(1), which took effect on February 1, 2007; and the Court further

ORDERS that the Clerk of the Court shall enter judgment and close this case.

IT IS SO ORDERED.

Dated: July 20, 2007
Syracuse, New York

s/ Frederick J. Scullin, Jr.
Frederick J. Scullin, Jr.
Senior United States District Court Judge

APPENDIX C — JOINT STIPULATIONS AND STATEMENT OF MATERIAL FACTS DATED MAY 11, 2007

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

Civil Action No. 5:07-cv-00117-FJS-GHL

JAMES L. ALEXANDER, et al.,

Plaintiffs,

v.

THOMAS J. CAHILL, et al.,

Defendants.

JOINT STIPULATIONS AND STATEMENT OF MATERIAL FACTS

The parties stipulate to the following facts, which also serve as the parties' joint statement of material facts pursuant to L.R. 7.1(a)(3):

I. Plaintiffs James L. Alexander and Alexander & Catalano

1. Plaintiff James L. Alexander is a resident of Onondaga, New York. Alexander was admitted to the New York State Bar in 1984 and actively practices law in New York. Alexander is the managing partner of the firm Alexander & Catalano.

2. Plaintiff Alexander & Catalano LLC is a New York law firm founded by plaintiff Alexander and his partner Peter Catalano in 1996. The firm has offices in Syracuse and Rochester, New York. It employs several attorneys who are licensed in New York and represents clients in the state.

3. Alexander & Catalano communicates its services to the public through broadcast media, print advertisements and other forms of public media. Prior to February 1, 2007, Alexander & Catalano's commercials often contained jingles and special effects, including wisps of smoke and blue electrical currents surrounding the firm's name.

4. Prior to February 1, 2007, Alexander & Catalano identified itself in the majority of its television and print advertising, and on its website, as the "heavy hitters." Alexander & Catalano also commonly used phrases like "think big" and "we'll give you a big helping hand" in its advertising.

5. Between 2001 and 2006, Alexander & Catalano received more than 42,000 incoming phone calls from potential clients. Over the past ten years, the firm has received fewer than ten complaints about the tastefulness of its advertisements.

6. No disciplinary actions have been brought against Alexander & Catalano or its lawyers based on the firm's advertising.

Appendix C

II. Plaintiff Public Citizen

7. Plaintiff Public Citizen, Inc., is a nonprofit corporation organized under the laws of the District of Columbia and authorized to conduct business there. Public Citizen has filed all required paperwork and paid all fees required to operate as a nonprofit organization in the state of New York.

8. Public Citizen Litigation Group (PCLG) is a division of Public Citizen that conducts litigation in state and federal courts. Since its founding in 1972, PCLG has litigated for the public interest in cases concerning federal health and safety regulations, consumer rights, access to the civil justice system, freedom of information and other open government matters, separation of powers, and the First Amendment, including the First Amendment right of its members to receive commercial communications. Of PCLG's eight staff lawyers, two are licensed to practice law in New York. PCLG has solicited clients in New York for representation on a pro bono basis and has represented clients before state and federal courts in New York.

9. Public Citizen has approximately 100,000 members nationwide, including approximately 9,450 in New York, who have contributed money to Public Citizen to support the organization's mission. Public Citizen's members are consumers of legal services.

Appendix C

III. Amendments to New York's Disciplinary Rules Governing Lawyer Advertising

10. The Appellate Division of the New York Supreme Court is responsible for enforcing professional discipline against lawyers in the state. The Appellate Division is authorized to censure, suspend, or disbar lawyers guilty of professional misconduct.

11. Pursuant to this authority, the presiding justices of the four departments of the Appellate Division are responsible for adopting the Disciplinary Rules of New York's Code of Professional Responsibility as joint rules of the Appellate Division. The rules define "professional misconduct" as used in the Judiciary Law. Lawyers who violate the rules are subject to various forms of discipline, including censure, suspension, or disbarment.

12. In June 2006, the presiding justices of each of the four departments of the Appellate Division approved for public comment proposed amendments to the disciplinary rules governing lawyer advertising.

13. On January 4, 2007, the presiding justices adopted a final version of the amendments to become effective on February 1, 2007.

14. Defendants are the Chief Counsels or Acting Chief Counsels of the Disciplinary Committees of the New York Supreme Court Appellate Division, who collectively are charged with investigating and prosecuting violations of New York's disciplinary rules.

15. Alexander & Catalano has a reasonable fear that some techniques used in its advertisements may violate the rules. Alexander & Catalano has altered its advertising campaign to stop running many of its advertisements, including the advertisements in Exhibit 1 to the affidavit of James L. Alexander, filed in this case on February 14, 2007, and has removed its slogans, including the "heavy hitters" slogan, from its advertising in an attempt to comply with the rules. Alexander & Catalano will resume running its previous commercials, or similar commercials, in the future if not prohibited from doing so by the rules.

IV. Exhibits

16. Exhibit 1 is a true and accurate copy of the Report and Recommendations of the New York State Bar Association's Task Force on Lawyer Advertising, completed on October 21, 2005.

17. Exhibit 2 is a true and accurate copy of a letter from the Federal Trade Commission's Office of Policy Planning, Bureau of Consumer Protection, and Bureau of Economics, submitted to New York's Office of Court Administration on September 14, 2006.

18. Exhibit 3 is a true and accurate copy of the Comments of Public Citizen Litigation Group, the American Civil Liberties Union, and the New York Civil Liberties Union on the Proposed Amendments to Rules Governing Lawyer Advertising, submitted to New York's Office of Court Administration on November 15, 2006.

19. Exhibit 4 is a true and accurate copy of a press release from the New York State Bar Association, released January 4, 2006.

20. Exhibit 5 is a true and accurate copy of a press release from the New York Office of Court Administration, released June 15, 2006.

21. The DVD attached as Exhibit 1 to the affidavit of James L. Alexander, filed in this case on February 14, 2007, is a true and accurate copy of a selection of Alexander & Catalano's television advertisements run by the firm before February 1, 2007.

22. The DVD attached as Exhibit 1 to the affirmation of Patrick F. MacRae, filed in this case on March 27, 2007, is a true and accurate recording of a forum held by the Monroe County Bar Association on August 17, 2006, at which former Presiding Justice Eugene F. Pigott was a speaker.

23. The parties stipulate to the authenticity, but not the legal relevance, of each of these exhibits.

So stipulated,

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Appendix C

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Dated: May 11, 2007

APPENDIX D — COMPLAINT FILED FEBRUARY 1, 2007

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

Civil Action No.

JAMES L. ALEXANDER; ALEXANDER & CATALANO LLC; and PUBLIC CITIZEN, INC.,

Plaintiffs,

v.

THOMAS J. CAHILL, in his official capacity as Chief Counsel for the Departmental Disciplinary Committee for the Appellate Division of the New York Court of Appeals, First Department; DIANA MAXFIELD KEARSE, in her official capacity as Chief Counsel for the Grievance Committee for the Second and Eleventh Judicial Districts; GARY L. CASELLA, in his official capacity as Chief Counsel for the Grievance Committee for the Ninth Judicial District; RITA E. ADLER, in her official capacity as Chief Counsel for the Grievance Committee for the Tenth Judicial District; MARK S. OCHS in his official capacity as Chief Attorney for the Committee on Professional Standards for the Appellate Division of the New York Court of Appeals, Third DepaiIntent; ANTHONY J. GIGLIOTTI, in his official capacity as acting Chief Counsel for the Grievance Committee for the Fifth Judicial District; DANIEL A. DRAKE, in his official capacity as acting Chief Counsel for the Grievance Committee for the Seventh Judicial

District; and VINCENT L. SCARSELLA, in his official capacity as acting Chief Counsel for the Grievance Committee for the Eighth Judicial District,

Defendants.

COMPLAINT

1. This is a suit for injunctive and declaratory relief under 42 U.S.C. § 1983 against the chief counsels of New York's lawyer disciplinary committees, seeking declaratory and injunctive relief against enforcement of the state's new mandatory ethics rules governing lawyer advertising. The ethics rules, as amended effective February 1, 2007, allow for arbitrary and discriminatory enforcement and impose onerous restrictions on both commercial and noncommercial speech that the state has no legitimate interest in regulating. The amended rules are therefore unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution.

I. *Jurisdiction*

2. The Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

H. *Parties*

3. Plaintiff James L. Alexander is a resident of Onondaga, New York. Alexander was admitted to the New York State Bar in 1984 and has actively practiced

law in New York for the past twenty-three years. He is a member of the New York State Bar Association, the Onondaga County Bar Association, and the American Association for Justice, and serves on the Board of Directors of the New York State Trial Lawyers Association. Alexander is the managing partner of the firm Alexander & Catalano.

4. Plaintiff Alexander & Catalano LLC is a New York law firm founded by plaintiff Alexander and his partner Peter Catalano in 1996. The firm has offices in Syracuse and Rochester, New York. It employs eight attorneys licensed in New York and other jurisdictions who represent clients in personal injury and wrongful death claims. Alexander & Catalano communicates its services to the public through broadcast media, print advertisements, and other forms of public media. The firm also operates a website from within New York at http://www.alexanderandcatalano.com/.

5. Plaintiff Public Citizen, Inc. is a nonprofit public interest organization with approximately 100,000 members nationwide, including more than 9,450 in New York. Public Citizen Litigation Group (PCLG) is a division of Public Citizen that conducts litigation in state and federal courts. Of PCLG's eight staff lawyers, two are licensed to practice law in New York. PCLG has solicited clients in New York for representation on a pro bono basis and has represented clients before state and federal courts in New York. PCLG distributes a variety of educational materials to the public. It also operates websites at http://www.citizen.org/litigation/ and http://

www.cyberSLAPP.org/, and co-sponsors the Consumer Law & Policy Blog at http://www.clpblog.org/, all of which are accessible from within New York. Public Citizen has an interest in protecting its New York members, who will be deprived of information about their legal rights and available legal services under the amendments.

6. Defendant Thomas J. Cahill is Chief Counsel for the Departmental Disciplinary Committee for the First Department of the Appellate Division of the New York Court of Appeals.

7. Defendant Diana Maxfield Kearse is Chief Counsel for the Grievance Committee for the Second and Eleventh Judicial Districts, which are part of the Second Department of the Appellate Division of the New York Court of Appeals.

8. Defendant Gary I. Casella is Chief Counsel for the Grievance Committee for the Ninth Judicial District, which is part of the Second Department of the Appellate Division of the New York Court of Appeals.

9. Defendant Rita E. Adler is Chief Counsel for the Grievance Committee for the Tenth Judicial District, which is part of the Second Department of the Appellate Division of the New York Court of Appeals.

10. Defendant Mark S. Ochs is Chief Attorney for the Committee on Professional Standards for the Third Department of the Appellate Division of the New York Court of Appeals.

11. Anthony J. Gigliotti is acting Chief Counsel for the Grievance Committee for the Fifth Judicial District, which is part of the Fourth Department of the Appellate Division of the New York Court of Appeals.

12. Daniel A. Drake is acting Chief Counsel for the Grievance Committee for the Seventh Judicial District, which is part of the Fourth Department of the Appellate Division of the New York Court of Appeals.

13. Vincent L. Scarsella is acting Chief Counsel for the Grievance Committee for the Eighth Judicial District, which is part of the Fourth Department of the Appellate Division of the New York Court of Appeals.

III. *Factual Allegations*

A. Rules Governing Lawyer Discipline in New York

14. The Appellate Division of the New York Supreme Court is responsible for enforcing professional discipline against lawyers in the state. N.Y. Judiciary Law § 90(2). The Appellate Division is authorized to censure, suspend, or disbar lawyers guilty of "professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice." *Id.*

15. Pursuant to this authority, the presiding justices of the four departments of the Appellate Division are responsible for adopting the Disciplinary Rules of New York's Code of Professional Responsibility as joint rules

of the Appellate Division. The rules define "professional misconduct" as used in the Judiciary Law. *See* 22 NYCRR § 603.2 (1st Dept.); 22 NYCRR § 691.2 (2d Dept.); 22 NYCRR § 806.2 (3d Dept.); 22 NYCRR § 1022.17 (4th Dept.). Lawyers who violate the rules are subject to various forms of discipline, including censure, suspension, or disbarment.

16. Each department of the Appellate Division operates its own lawyer grievance procedure. The First and Third Departments each have a single disciplinary committee covering the entire department. The Second and Fourth Departments have separate committees for each judicial district within their territories. Each of the state's various grievance committees has the authority to bring complaints against lawyers, to discipline lawyers in cases of minor misconduct by issuing letters of caution and admonition, and to recommend that the Appellate Division institute formal disciplinary proceedings in cases of serious misconduct.

17. The chief counsel of each committee is responsible for investigating and prosecuting alleged disciplinary violations and has authority to dismiss disciplinary charges against a lawyer. Collectively, the chief counsels of the committees are responsible for enforcing New York's disciplinary rules throughout the state.

Appendix D

B. The Amendments to New York's Disciplinary Rules Governing Lawyer Advertising

18. The Disciplinary Rules of New York's Code of Professional Responsibility prohibit lawyers from disseminating false. deceptive, or misleading communications. 22 NYCRR § 1200.6(a).

19. In October 2005, a New York State Bar Association committee on lawyer advertising completed a detailed study of lawyer advertising in the state. In the committee's report, all seventeen members unanimously concluded that the state should not adopt any new content-based restrictions on lawyer advertising. Noting that approximately one-third of a sample of randomly selected New York lawyer advertisements were facially noncompliant with existing rules, the report concluded that stricter reporting requirements and better enforcement, rather than more rules, was the proper way to address problems with advertising in the state.

20. In June 2006, the presiding justices of each of the four departments of the Appellate Division approved for public comment proposed amendments to the disciplinary rules governing lawyer advertising. Contrary to the recommendations of the New York State Bar Association, the amended rules included sweeping new restrictions on the content of attorney advertising.

21. On September 4, 2006, the Federal Trade Commission's Office of Policy Planning, Bureau of

Consumer Protection, and Bureau of Economics submitted comments to the proposed rules advising that the rules may hurt consumers by inhibiting competition, frustrating consumer choice, and ultimately increasing prices while decreasing quality of service.

22. On November 15, 2006, plaintiff Public Citizen submitted comments opposing the amendments on the grounds that they would constitute an unconstitutional restriction on commercial and noncommercial speech.

23. On January 4, 2007, the presiding justices adopted a version of the amendments that differed from the version offered for public comment. The amendments include broad new prohibitions on communications by lawyers. The rules are scheduled to become effective on February 1, 2007.

24. Section 1200.5-a of the disciplinary rules provides that the rules apply to out-of-state attorneys who are licensed in the state when the predominant effect of the lawyer's conduct is felt in New York. Therefore, plaintiff Public Citizen's attorneys who are licensed in New York are subject to the rules to the extent their conduct has its predominant effect in the state.

25. None of the amendments is supported by studies, factual findings, or other evidence demonstrating a public need or a state interest in adopting the amendments. The amendments appear to be motivated solely by a general distaste for certain

forms of lawyer advertising and by discrimination against a certain class of attorneys who assist injured consumers.

C. The Amendments' Effect on Truthful, Non-Misleading Commercial Speech

26. The amendments include a variety of new rules governing lawyer advertising that restrict truthful, non-misleading communications that the state has no legitimate interest in regulating.

27. Section 1200.6(c)(3) of the new rules prohibits advertisements that "include the portrayal of a judge." This rule will prohibit future use of a television commercial previously run by Alexander & Catalano that depicts a courtroom with a judge and jury. The commercial illustrates the firm's willingness to go to court on its clients' behalf and states that the judge is there "to make sure [the trial] is fair." The commercial does not state or imply that any judge can be unfairly influenced by the firm and is not deceptive or misleading in any way. Alexander & Catalano will run this commercial, or a similar one, in the future if not prohibited from doing so by the rules.

28. Section 1200.6(c)(5) prohibits advertisements that "rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence."

Appendix D

a. Alexander & Catalano's commercials often contain comical scenes. For example, the commercials portray lawyers Alexander and Catalano as giants towering above local buildings, running to a client's house so fast they appear as blurs, jumping onto rooftops, and providing legal assistance to aliens. Because these scenes might be considered "techniques to obtain attention," and because the fictional traits exhibited by the lawyers in these scenes do not appear to be relevant to the selection of counsel, Alexander & Catalano has been forced to alter its advertising campaign to stop running these advertisements. As a result, the firm's ability to market its services has been significantly impaired.

b. Section 1200.6(c)(5) is too vague to provide guidance as to what kinds of advertisements are prohibited and invites arbitrary and discriminatory enforcement. All of Alexander & Catalano's commercials include memorable jingles or special effects, such as wisps of smoke and blue electrical currents surrounding the firm's name. A disciplinary committee might determine that any of the techniques used by Alexander & Catalano are designed to "obtain attention" and do not obviously relate to selection of counsel or legal competence. Even a television commercial by the firm showing a list of charities to which the firm has donated may run afoul of the rule against attention-getting techniques because this advertisement brings attention to the firm and does not seem related to legal competence. Because of the extremely broad language of the rules, Alexander & Catalano has a reasonable fear

that its remaining advertisements may subject the firm and its attorneys to professional discipline.

29. Section 1200.6(c)(7) prohibits advertisements that "utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter."

a. Alexander & Catalano identities itself in the majority of its television and print advertising as the "heavy hitters." Although Alexander & Catalano believes that the phrase "heavy hitters" implies only knowledge of the subject matter of its practice, the firm fears that disciplinary authorities may conclude that the phrase also "implies an ability to obtain results." The firm has therefore been forced to remove this slogan from its advertising at significant expense and, as a result, will lose the benefit of widespread public recognition of its slogan.

b. The rules do not define or provide examples of what are deemed to be nicknames, monikers, mottos, and trade names, and invite arbitrary and discriminatory enforcement. Alexander & Catalano commonly uses phrases like "think big" and "we'll give you a big helping hand" in its advertising. The firm has a reasonable fear that disciplinary authorities might classify these statements as a nickname, moniker, motto, or trade name that implies an ability to obtain results and subject the firm and its attorneys to discipline.

30. The cumulative effect of the amendments is to prohibit a wide range of potentially interesting and

informative commercial advertising by plaintiffs and by other lawyers and law firms that has no potential to confuse or deceive consumers. These advertisements are especially relied on by consumers of moderate means who may not be experienced consumers of legal services and who are underserved by other attorneys.

31. Between 2001 and 2006, Alexander & Catalano received more than 42,000 incoming phone calls from potential clients. Despite the large volume of calls, Alexander & Catalano has received fewer than ten complaints about the firm's advertisements over the past ten years. No disciplinary actions have been brought against the firm based on its advertising, and, as far as plaintiffs are aware, only one complaint has ever been received by a state disciplinary committee. That complaint involved a subject not covered by the amendments and was closed by the disciplinary committee without any charges being filed against the firm or its attorneys.

32. The amendments cast doubt on the continued legality of many advertisements run by Alexander & Catalano and will force the firm to modify its existing advertising campaign and design new commercials at significant expense. As a result, it will suffer a loss of name recognition and goodwill based on its unique advertising campaign developed over the past ten years. The firm will also be hampered by the rules in its ability to communicate its message to consumers and will therefore have more difficulty locating potential clients.

Appendix D

D. The Amendments' Unconstitutional Restrictions on Noncommercial Speech

33. The amendments change § 1200.1 of the Disciplinary Rules to define the word "advertising" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." The definition includes exceptions for "communications to existing clients or other lawyers," but contains no exception for noncommercial speech. *Id.*

a. The plain language of the definition covers solicitation of potential clients for pro bono representation by Public Citizen received by potential clients in New York. The rules would apply even to the solicitation of clients to challenge the constitutionality of the disciplinary rules themselves.

b. The rules will cover telephone, email, and written solicitations to consumers in New York. They will also cover web pages, press releases, and other materials distributed by Public Citizen in New York for the purpose of soliciting clients for pro bono representation.

c. All the restrictions on speech discussed in Section III.C, *supra*, would therefore apply equally to pro bono solicitations.

Appendix D

34. Sections 1200.6(d) and (e) require that statements in pro bono solicitations or other material meeting the definition of "advertising" about a lawyer's abilities and past successes, including statements of the quality of a lawyer's services, statements of comparative advertising, testimonials by clients, and "statements that are reasonably likely to create an expectation about results," be accompanied by the disclaimer: "Prior results do not guarantee a similar outcome." Public Citizen frequently makes statements about the quality of its services and past successes. Recipients of noncommercial speech and pro bono solicitations are not likely to be confused by these statements, and the state has no interest in regulating them as applied to noncommercial speech.

35. Section 1200.6(f) requires that the words "Attorney Advertising" appear in all written advertisements, including electronic communications. It further requires that the words "ATTORNEY ADVERTISING," in all capital letters, be included in the subject line of emailed advertisements. *Id.* By flagging these communications as advertising even though they are not designed to attract clients for pecuniary gain, the amendments dramatically increase the likelihood that the communications will not reach their intended recipients. For example, the recipient of a pro bono solicitation by Public Citizen would likely ignore or discard material labeled "Attorney Advertising." Similarly, email labeled "ATTORNEY ADVERTISING" in the subject line would likely be blocked by a Spam filter or deleted by the recipient without being read.

36. Section 1200.6(k) requires lawyers and law firms to retain copies of all communications defined as advertisements for a period of one to three years. This rule would require Public Citizen to save copies of all emailed solicitations for pro bono representation received by consumers in New York, including attachments and links related to the email. § 1200.6(k). Complying with this rule would involve an unjustified expense and would burden plaintiffs' ability to engage in noncommercial communication.

37. Section 1200.7(e) requires that all lawyers and law firms using an Internet website include the name of the lawyer or law firm in the website's address unless all pages of the website "clearly and conspicuously include the actual name of the lawyer or law firm" and unless the lawyer refrains from "engag[ing] in the practice of law using the domain name." *Id.* In addition, the rule prohibits lawyers and law firms from using domain names that "imply an ability to obtain results in a matter." *Id.*

a. The rule includes no requirement that the website be used for advertising purposes and therefore affects even web pages that are totally unrelated to the lawyer's practice of law. This rule will prohibit the use of domain names for noncommercial communications that the state has no interest in regulating and are outside of scope of the courts' authority to regulate attorney advertising.

b. PCLG operates several websites at http://www.citizen.org/litigation/, http://www.cyberslapp.org/, and http://www.clpblog.org/. None of these website addresses includes Public Citizen or PCLG's name in the website address. Public Citizen has solicited clients and communicated with clients in New York using one or more of these domain names and intends to continue doing so in the future.

c. Because brevity is important in the choice of a domain name, this restriction would impose serious and unnecessary burdens on Internet-based speech. The rules will force lawyers with established domain names to relocate their websites to new domains at significant expense.

d. The state has no legitimate interest in prohibiting the practice of law using domain names that "imply an ability to obtain results."

38. Section 1200.41-a imposes a thirty-day waiting period on communications by lawyers and law firms to individuals and their family members and legal representatives in the event of an incident involving potential claims for personal injury or wrongful death. Under this rule, Public Citizen will be prohibited from communicating with injured citizens in New York to inform them of the availability of pro bono legal representation.

39. The cumulative effect of the amendments would be to chill noncommercial speech by Public Citizen and

other nonprofit lawyers and organizations and would unreasonably burden the right of these lawyers and organizations to engage in noncommercial speech and free association.

E. Injury to New York Consumers

40. The rules' burdensome prohibitions on speech, discussed in Section III.C & D, *supra*, will chill lawyers from engaging in advertising and other forms of communication and will therefore injure New York consumers, including New York members of Public Citizen, by preventing them trom receiving truthful, non-misleading information about legal services and their legal rights. Consumers of moderate means who may not be sophisticated consumers of legal services will be among the most seriously affected by the chill on commercial speech, as will consumers who are illiterate, do not speak English, or, because of an injury or disability, cannot read or understand other sorts of advertisements.

41. Sections 1200.8(g) and 1200.41-a prohibit advertisements and solicitations regarding incidents involving potential claims for personal injury or wrongful death for a thirty-day period after the incident. These rules prohibit not only in-person, telephone, and direct mail solicitations, but also advertisements on radio, television, and the Internet that do not intrude on the privacy of consumers. As a result, New York members of Public Citizen will be blocked from receiving information about their rights relating to the incident,

even if they actively seek this information on the Internet.

42. Section 1200.6(g) prohibits lawyers and law firms from using pop-up or pop-under Internet advertisements other than on the lawyer's or law firm's own website, regardless of whether these advertisements are deceptive or misleading. This section interferes with the ability of New York members of Public Citizen to learn about available legal services and their rights. There is no evidence that consumers are deceived or unduly influenced by pop-up or pop-under advertisements, which can be closed with a single click or eliminated with pop-up blocking software, and are therefore at least as easy to dispose of as mailed solicitations.

IV. *Claim for Relief*

43. The amendments discussed above restrict and chill the exercise of the rights of commercial and noncommercial free speech and the right of association secured by the First Amendment of the U.S. Constitution, as applied to the states through the Fourteenth Amendment to the Constitution.

44. The amendments are vague and allow for arbitrary and discriminatory enforcement in violation of the First Amendment of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment.

WHEREFORE, plaintiffs request that this Court:

1. Declare unconstitutional and issue a preliminary and permanent injunction against enforcement of §§ 1200.6(c)(1), (3), (5), (7), (g)(I), 1200.7(e), 1200.8(g), 1200.41-a, and the first clause of § 1200.6(c)(3) of the amendments to the Disciplinary Rules of the Code of Professional Responsibility that become effective on February 1, 2007.

2. Declare unconstitutional and issue a preliminary and permanent injunction against §§ 1200.6, 1200.7, and 1200.41-a of the rules as applied to communications where the lawyer's primary purpose is not pecuniary gain.

3. Award plaintiffs their costs, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988; and

4. Grant any additional relief to which plaintiffs may be entitled.

Respectfully submitted,

/s Scott L. Nelson
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